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THE OSSIFICATION OF AMERICAN LABOR LAW

Cynthia L. Estlund*

In this Article, Professor Estlund argues that the ineffectuality of American labor law and the shrinking scope of collective representation are partly traceable to the law's "ossification" and its longstanding insulation from democratic renewal and local innovation. The elements of this process of ossification are various and mostly familiar; yet together they make up an impressive set of barriers to innovation. The basic text has been practically unamendable for a half-century, and the regime it creates has been cut off from "market"-based competition from employers, from the creative pressure of private litigation, from state and local innovation, from changing constitutional doctrine, and from emerging transnational legal norms. Moreover, the National Labor Relations Board, charged with interpreting and administering the labor laws in light of modern conditions, is increasingly hemmed in by the age of the text and the cumulative impact of stare decisis. While the argument may seem to counsel only pessimism about the prospects for reform, it may also help to identify potential pathways of change that have not been fully appreciated. Some of those pathways are being paved by the process of ossification itself: By impelling private parties to find their own paths outside of the existing legal regime, the ossification of labor law is setting in motion forces that may eventually produce legal change.

INTRODUCTION

The law of the workplace is vast and dynamic. It includes the burgeoning law of employment discrimination and individual employee rights, as well as the direct governmental regulation of terms and conditions of work. The combined weight of those employment laws and doctrines has spawned a new field of legal study and an expanding area of legal practice, and accounts for a growing share of the courts' dockets. At the same time, private sector labor law—the law that governs workers' efforts to advance their own shared interests through self-organization and collective protest, pressure, negotiation, and agreement with employers—has shrunk in its reach and its significance, and is clearly ailing. Evidence of morbidity abounds, but two familiar pieces of data will suffice to make the point here: the drastic diminution of organized labor's share of the private sector workforce, and hence the ambit of collective bargain-

* Professor, Columbia Law School. I would like to thank Jim Brudney, Charles Craver, Fred Feinstein, Joan Flynn, Matt Finkin, Jack Getman, Sam Issacharoff, and Catherine Powell, along with the participants in a Columbia faculty workshop and attendees at a presentation before the American Bar Association Section of Labor & Employment, Committee on Developments under the NLRA, for their thoughtful comments on earlier versions of this Article. In addition, I gratefully acknowledge the valuable research assistance of Emma Dewald, David Ryan, Daniel Suleiman, and Pankaj Venugopal, and the exceptional editorial assistance of Eric Berger.

ing, to under ten percent;¹ and the large “representation gap” between the desire for and the supply of collective representation in workplace governance.² The labor laws have failed to deliver an effective mechanism of workplace representation, and have become nearly irrelevant, to the vast majority of private sector American workers.

Yet if we strip the existing model down to its essentials—the right of employees to form associations and seek shared workplace objectives, free from employer interference and retaliation, and the right to bargain collectively with their employers about terms and conditions of employment—it is hard to see how we could do without it. The right of employees to associate, communicate about shared concerns, form organizations for mutual aid, and peacefully seek shared objectives has achieved the status of an international human right, and it has not been seriously questioned in the United States—in principle—for generations.

As for collective bargaining, it is hard to be against the idea of fostering negotiations between the managers of an enterprise and the workers, speaking through their chosen representatives, over wages and working conditions. Putting aside the particular choices that labor and management have made (some of which now appear rigid and inefficient)³, and some of the particular embellishments added by the labor laws, collective bargaining in its essence responds to current demands for flexible accommodation to the market, to local conditions, and to change. It is at least potentially decentralized, tailored to local circumstances, flexible, and democratic.⁴ Indeed, collective bargaining would seem to represent a promising “third way” between the harsh regimen of individual contract

1. See Press Release, Bureau of Labor Statistics, Union Members Summary (Jan. 17, 2002), available at <ftp://146.142.4.23/pub/news.release/union2.txt> (on file with the *Columbia Law Review*) (13.5% of all wage and salary earners and 9% of those in the private sector were union members in 2001; this represents no change from 2000).

2. In their extensive study of employee attitudes about work and workplace influence, Richard Freeman and Joel Rogers found that 63% of workers wanted more influence than they had at work. Richard B. Freeman & Joel Rogers, *What Workers Want* 41 (1999). Fifty-six percent would feel more comfortable raising workplace problems through an employee association than on their own. *Id.* at 55. When asked whether they would vote for union representation if given the chance, 32% of unrepresented workers (and 90% of union members) said they would. *Id.* at 69.

3. For example, many observers believe that unions’ insistence on “pattern bargaining,” which called for uniform contract terms throughout an industry, contributed to the decline of unionized manufacturing in the 1980s. See James J. Brudney, *To Strike or Not to Strike*, 1999 Wis. L. Rev. 65, 79–80 [hereinafter Brudney, *To Strike*] (book review). Since then, pattern bargaining has mostly given way to plant and firm level bargaining with greater local variation and responsiveness to economic conditions. See Audrey Freedman & William E. Fulmer, *Last Rites for Pattern Bargaining*, Harv. Bus. Rev., Mar.–Apr. 1982, at 30, 40.

4. Collective bargaining thus has some of the qualities that Professors Dorf and Sabel associate with “democratic experimentalism.” See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267 (1998) (defining new forms of governance, characterized by increased local control and experimentation within national framework).

and the much-maligned paradigm of centralized “command and control” regulation. That is no accident. The New Deal’s institutionalization of collective bargaining was designed to rectify the failings of individual “liberty of contract” at a time when mandated minimum terms were still constitutionally and politically suspect, and the increasing role of minimum standards legislation since then is often described as a response to the decline of collective bargaining and the regulatory vacuum it has left behind.⁵ There would thus be a certain historical logic to the revival of collective bargaining at a time when the centralized imposition of uniform regulations is increasingly questioned.

So why is the system of collective bargaining under American labor law, the essentials of which are so essential, so moribund? An answer of sorts may be found in the decline of organized labor.⁶ Labor unions are, after all, the labor law’s designated vehicles of employee representation; collective bargaining cannot occur without collective representation. But that answer merely recasts the question: Why has organized labor’s share of the workforce shrunk so dramatically? Scholars have advanced several answers, not mutually exclusive but competing for emphasis: increasingly brazen employer resistance and the law’s inadequate response to that resistance;⁷ structural economic change, including deindustrialization and increasingly global and competitive product markets;⁸ a mismatch between the interests of both employees and employers and traditional ad-

5. See Paul C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* 7–8 (1990) [hereinafter Weiler, *Governing*] (noting that federal labor policy has aimed to restructure the labor market “so as to give employers greater group leverage” in dealing with large corporate employers); Samuel Issacharoff, *Reconstructing Employment*, 104 Harv. L. Rev. 607, 618 (1990) (book review); Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons From Labor Law*, 1986 U. Ill. L. Rev. 689, 698 [hereinafter Summers, *Lessons*] (recounting that Wagner Act was meant to redress “intolerable social results of individual bargaining” while avoiding excessive direct regulation of employment).

6. For a concise overview of organized labor’s decline and its causes, see Charles B. Craver, *Can Unions Survive?* 34–55 (1993) [hereinafter Craver, *Unions*] (pointing especially to impact of economic cycles, industrial changes, and immigration patterns). For a more extended treatment, see Michael Goldfield, *The Decline of Organized Labor in the United States* 94–112 (1987) (highlighting three explanations for decline in union membership: change in structure and composition of labor force; various cyclical, economic, social and political conditions; and changing nature and interrelation of class forces).

7. See Craver, *Unions*, *supra* note 6, at 47–51; Weiler, *Governing*, *supra* note 5, at 105–33; Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 Indus. & Lab. Rel. Rev. 351, 351 (1990); Julius G. Getman, *Explaining the Fall of the Labor Movement*, 41 St. Louis U. L.J. 575, 578–84 (1997); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 Chi.-Kent L. Rev. 59, 61–62 (1993) [hereinafter Gottesman, *In Despair*]; Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1769–70 (1983) [hereinafter Weiler, *Promises to Keep*].

8. See Craver, *Unions*, *supra* note 6, at 42–47; Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 Chi.-Kent L. Rev. 3, 4–5 (1993); Leo Troy,

versarial unionism;⁹ and unions' own complacency and lack of commitment to organizing for several crucial decades.¹⁰

Here I develop a complementary argument about the labor laws themselves: The ineffectuality of American labor law, and the shrinking scope of collective representation and collective bargaining, is partly traceable to the law's "ossification." The core of American labor law has been essentially sealed off—to a remarkably complete extent and for a remarkably long time—both from democratic revision and renewal and from local experimentation and innovation. The basic statutory language, and many of the intermediate level principles and procedures through which the essentials of self-organization and collective bargaining are put into practice, have been nearly frozen, or ossified, for over fifty years.

The elements of this process of ossification are mostly familiar; yet, once assembled, they make up an impressive set of barriers to innovation. Most importantly, a longstanding political impasse at the national level has blocked any major congressional revision of the basic text since at least 1959. Moreover, the basic text itself, almost all of which dates from either 1935 or 1947, contains additional built-in obstacles to change. The original and unrevised federal ban on "company unions" has inhibited the development of competing, employer-sponsored forms of employee representation. The absence of a private right of action to enforce basic employee rights excludes the energies of private plaintiffs and their attorneys, and the creative role of courts, that have together so dramatically changed the landscape of "employment law." And the National Labor Relations Board ("NLRB" or "Board")—the designated institutional vehicle for adjusting the labor laws to modern conditions—is itself increasingly constrained by the age of the text and the large body of judicial, especially Supreme Court, interpretations that have piled up over the years. Even when it is operating within the bounds of existing precedent, the Board is hemmed in by Congress and particularly by the federal judiciary, both of which have grown unsympathetic to—even unfamiliar with—the collectivist premises of the New Deal labor law regime as it falls increasingly out of sync with the surrounding legal landscape.¹¹

Other possible avenues of revision and variation from outside the congressional scheme have also been closed or never opened. The broad

Is the U.S. Unique in the Decline of Private Sector Unionism?, 11 J. Lab. Res. 111, 113–20 (1990).

9. Freeman and Rogers find evidence of this in employees' overwhelming preference for an employee organization that was "run jointly" by employees and management (85%) to one run "by employees alone" (10%). Freeman & Rogers, *supra* note 2, at 56.

10. See Kate Bronfenbrenner et al., Introduction to Organizing to Win: New Research on Union Strategies 5–6 (Kate Bronfenbrenner et al. eds., 1998) [hereinafter *Organizing to Win*].

11. James J. Brudney, A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process, 74 N.C. L. Rev. 939, 944–48 (1996) [hereinafter Brudney, *Famous Victory*].

implied federal preemption of state and local laws affecting collective labor relations blocks democratically inspired reforms or variations at the state and local level, as well as state common law innovation. The stubborn imperviousness of labor law to most constitutional scrutiny, and the unusually sturdy deference to congressional judgment, has insulated labor law from an evolving body of legal norms that have extended robust protection to nonlabor protest and remade the law of public employment. Resistance to transnational legal authority, endemic to American law, has insulated labor law from the potential influence of international human rights or other labor rights such as those that have forced the reexamination of national labor laws in Europe and elsewhere.

So American labor law has been largely insulated from both internal and external sources of renovation. It has been cut off from revision at the national level by Congress; from “market”-driven competition by employers; from the entrepreneurial energies of individual plaintiffs and the plaintiffs’ bar, and the creativity they can sometimes coax from the courts; from variation at the state or local level by representative or judicial bodies; from the winds of changing constitutional doctrine; and from emerging transnational legal norms. Even without knowing where any of these potential paths of change might have led, one can surmise that change or experimentation through one or more of these channels might have produced, over the past half-century, a body of labor law that was more responsive to the very different economic and social conditions that workers and employers face today.

It will come as no surprise to anyone with a passing familiarity with labor law that it is old, in many ways anachronistic, and unusually resistant to change. Certainly those of us who teach labor law recognize the chilling, and sometimes thrilling, sense of being transported to a different era—one in which labor was insurgent and the ideas of collective empowerment and economic democracy had real currency in public discourse. Even so, the variety and cumulative weight of the barriers to change have not been fully appreciated. I know of no other major American legal regime—no other body of federal law that governs a whole domain of social life—that has been so insulated from significant change for so long.¹²

So my main objective here is to draw attention—both from inside and from outside the somewhat insular world of labor law—to the remarkable convergence of institutional barriers to even incremental labor law reform. To that end, in Parts I, II, and III, I examine the various blocked or obstructed paths of labor law renewal. I begin in Part I with the congressional impasse, the lynchpin of ossification. Part II takes up the blockages that were built into the original federal scheme. Part III

12. I make no effort here to compare the extent and duration of labor law’s ossification to that of other areas of federal law. But no serious contenders have emerged in discussions with the diversely-schooled colleagues who have read earlier versions of this Article.

turns to the potential avenues of change from outside the federal statutory scheme—from state and local variation, from constitutional scrutiny, and from international and transnational legal challenge. Along the way I take up some examples of “what might have been.” But this is not meant to be an exercise in counterfactual speculation; it is impossible to extrapolate from these examples to a full picture of the labor laws we might have had in the absence of any or all of these obstacles to change. My purpose in drawing attention to “what might have been” is to launch a brief discussion in Part IV of the implications of ossification: What role has labor law’s ossification played in the current moribund state of the collective bargaining regime? And what might the ossification thesis suggest about the future of labor relations law and the potential for reform?

This last question may provoke puzzlement. For at first blush, the argument may seem to offer nothing but bleak pessimism about the prospects for reform. Viewed differently, however, it may help to identify avenues of change that have not been fully appreciated. The frustration of reform advocates has been focused mainly on Congress and secondarily on the courts, and those indeed appear to be the primary culprits in the process of ossification. But there are many potential pathways of legal change, some of which may warrant more serious exploration than they have thus far attracted.

Indeed, some of those pathways are being paved by the process of ossification itself: As labor law becomes increasingly ineffectual in the face of employer recalcitrance, frustrated employees and creative unions are developing new legal and nonlegal strategies that largely steer clear of “labor law” as we know it—strategies that depend little on the law’s help and that seek to avoid its snares. At the same time, employers are devising their own strategies of “self-help”—some of them clearly illegal, some of them of questionable legality—in the face of an ineffectual legal regime. By impelling private parties to find their own paths outside of the existing regime, the ossification of labor law may be setting in motion forces that may eventually lead toward legal change.

I. THE CONGRESSIONAL IMPASSE OVER LABOR LAW REFORM

One of the most striking features of American labor law is the age of its basic governing text. The current National Labor Relations Act (“NLRA” or “Act”)¹³ consists almost entirely of the original Wagner Act of 1935,¹⁴ together with the major Taft-Hartley amendments of 1947¹⁵ and the relatively minor changes of the Landrum-Griffin Act of 1959.¹⁶ The

13. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2000).

14. National Labor Relations (Wagner) Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169).

15. Labor-Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

16. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

text has remained virtually untouched since 1959.¹⁷ It might seem necessary to begin an account of the ossification of labor law by describing the regime that has become ossified. I will largely sidestep that tedious task and leave the reader to glean the contents of the existing, ossified regime from its discontents—from the most salient and persistent criticisms of that regime. But a few words of introduction of the scheme may be helpful to the uninitiated.

A. *Labor Law and Its Discontents: A Primer*

The Wagner Act of 1935—enacted in the throes of the Depression, in the face of rising labor militancy, and in the wake of an overwhelming electoral mandate in favor of the New Deal—declared an affirmative national policy in favor of collective bargaining. Section 7 recognized the right of employees “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.”¹⁸ Section 8, now 8(a),¹⁹ banned five employer “unfair labor practice[s]”: It prohibited employer interference, coercion, or restraint of employees in the exercise of section 7 rights; domination or assistance of labor organizations; discrimination based on union membership; discrimination based on participation in proceedings under the Act; and refusal to bargain in good faith with a union representing employees.²⁰ The Act established a mechanism for the election and certification of representative labor organizations, based on the principle of majority rule,²¹ and it created the NLRB to administer representation proceedings and to enforce the Act, subject to judicial review in the federal courts of appeals.²² The Supreme Court’s surprising constitutional vindication of the Act in 1937 as a proper exercise of Congress’s Commerce Clause powers inaugurated the modern era of American labor law.²³

The Taft-Hartley Act of 1947 represented a major setback for the labor movement.²⁴ The large congressional majority that enacted Taft-

For a concise overview of the legislative machinations accompanying the NLRA and each of its amendments, see *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act 24–66* (Patrick Hardin et al. eds., 4th ed. 2001) [hereinafter DLL].

17. See *infra* note 32.

18. National Labor Relations (Wagner) Act § 7.

19. 29 U.S.C. § 158(a) (2000).

20. National Labor Relations (Wagner) Act § 8(a).

21. *Id.* § 9.

22. *Id.* § 3 (creating Board); *id.* § 10 (discussing Board’s powers).

23. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (upholding the Act as valid exercise of Congress’s commerce power).

24. Contemporary labor historians disagree over the extent to which Taft-Hartley was a turning point or more of a codification and consolidation of preexisting legal restrictions. See Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 *Cath. U. L.*

Hartley, over President Truman's veto, consisted of both opponents of collective bargaining who were refighting the battle they had lost in 1935 and others who professed support for collective bargaining and for the Wagner Act but concern about some NLRB practices as well as some union practices; the labor movement had quintupled in size since 1935, and was widely regarded as having "abused" its newfound power.²⁵ Taft-Hartley turned away from the forthright endorsement of collective bargaining and reframed the basic policy of the Act as favoring employee "free choice" with respect to unionization and collective bargaining. It amended section 7 to affirm employees' right to *refrain* from concerned activity, and added section 8(b), which prohibited unions from coercing or discriminating against employees, from refusing to bargain, and from engaging in secondary boycotts,²⁶ among other practices regarded by employers as unfair.²⁷ Taft-Hartley also made a number of changes in the administration of the Act.²⁸ But the 1947 amendments worked largely by addition, not subtraction; they left the core provisions of the original New

Rev. 763, 763–65 (1998) (reviewing various views). Certainly the labor movement had no doubts at the time. *Id.* at 766–67. Indeed, it was partly labor's intransigent opposition to any significant amendments to the Wagner Act that produced such strong antilabor provisions in the Taft-Hartley Act, "for organized labor's unfortunate decision to oppose all legislation left its sympathetic critics in a dilemma." Archibald Cox & Derek Bok, *Labor Law Cases and Materials* 133 (6th ed. 1965). The same intransigence, later directed to the complete repeal of Taft-Hartley, stymied efforts to secure any compromise legislation softening Taft-Hartley in the following few years. Benjamin Aaron, Amending the Taft-Hartley Act: A Decade of Frustration, 11 Indus. & Lab. Rel. Rev. 327, 329–30 (1958).

25. See Cox & Bok, *supra* note 24, at 133; DLL, *supra* note 16, at 29–37. In particular, critics pointed to unions' use of secondary boycotts and disruptive strikes, their insistence on closed-shop agreements, their involvement in jurisdictional disputes between unions, and in some cases their corruption. See Lichtenstein, *supra* note 24, at 766–67; James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 Colum. L. Rev. 1, 105–12 (2002) [*hereinafter Pope, Shaping*].

26. "Secondary" pressures are those that target employers other than the "primary" employer whose employees' terms and conditions of employment are in dispute; with a few exceptions, those other employers are legally defined as "neutral" in the labor dispute. Not all secondary pressures are unlawful, but almost all "picketing" of secondary employers is deemed coercive and therefore unlawful. For a detailed analysis of the secondary boycott provisions of the NLRA, see DLL, *supra* note 16, at 1614–1744.

27. Taft-Hartley also prohibited unions from compelling the assignment of work in a jurisdictional dispute among unions, from charging excessive dues, and from "featherbedding," or seeking payment for work not performed. See DLL, *supra* note 16, at 41–42. It also inaugurated the regulation of internal union affairs, which regime was overhauled and expanded in 1959.

28. Taft-Hartley separated the investigatory and prosecutorial functions of the General Counsel from the adjudicatory functions of the Board. See 29 U.S.C. § 153(d) (2000). It also excluded supervisors from the definition of "employee," required separate representation of plant guards, and the option of separate representation for professional employees. Taft-Hartley expressly legitimized state "right-to-work laws" that prohibited agreements requiring union membership. For an overview of the Taft-Hartley amendments and their history, see DLL, *supra* note 16, at 35–45.

Deal text—and in particular the original employer unfair labor practices—essentially intact.

Changes since 1947 have been comparatively minor. The Landrum-Griffin Act of 1959 imposed a regime for the regulation of internal union affairs, including a Bill of Rights for union members and provisions for union democracy.²⁹ But it only tinkered with the labor-management provisions of the NLRA, mainly by expanding the prohibition of secondary boycotts and by regulating recognitional picketing, and “hot cargo” agreements.³⁰ Those provisions were described by proponents as patching up “loopholes” left by Taft-Hartley.³¹

The text of the NLRA has remained virtually untouched since 1959.³² To be sure, much of that basic text is open-textured, and susceptible of a range of interpretations. Its declaration of employee rights is constitution-like in its phrasing, and its prohibitory provisions are studed with terms like “discriminate,” “interfere,” and “coerce” that had to be given meaning over time. But many crucial interpretive decisions were rendered by the Supreme Court in the early years of the Act’s existence, and have been in place—amendable only by Congress—since at least the 1950s.³³

Needless to say, much has happened since then. The labor force has changed, as women have flooded into the workforce and racial and eth-

29. See Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.). The Landrum-Griffin amendments to the NLRA and their history are explained in DLL, *supra* note 16, at 49–60.

30. In a “hot cargo agreement,” the employer agreed not to handle the products of another employer. Such agreements are prohibited by section 8(e) of the Act. 29 U.S.C. § 158(e).

31. DLL, *supra* note 16, at 57–58.

32. As a leading treatise puts it, “[t]he most significant development in the years since enactment of the Landrum-Griffin amendments in 1959 is that the Act has remained essentially unchanged.” DLL, *supra* note 16, at 61. The Act was extended in 1970 to the U.S. Postal Service, Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 720, 737, 39 U.S.C. § 1209 (2000), and in 1974 to health care institutions, with some qualifications and provisos. Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395, 29 U.S.C. §§ 152(14), 158(d). It is hard to imagine even these changes having been enacted in the congressional climate that has prevailed for the last twenty-five years. The only other changes have been extremely minor and technical.

33. Those early Supreme Court decisions—especially those made before Taft-Hartley—have been criticized for having “deradicalized” the original Wagner Act, see Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 Minn. L. Rev. 265, 265–70 (1978), and for having reintroduced into the labor law many of the common law doctrines that the Act was meant to repudiate. See generally James B. Atleson, *Values and Assumptions in American Labor Law* 9–10 (1983) (discussing these cases). Certainly the Court played a major part in shaping the Act, and often in an anti-union direction. A few of those decisions are discussed at, *infra* Part II.C. But it should be kept in mind that everything the Court did by way of interpreting the Act could have been undone by Congress. The congressional impasse is thus largely to blame for the entrenchment of those early decisions, as well as for the entrenchment of the text itself.

nic diversity has burgeoned.³⁴ The economy has changed as manufacturing has shrunk relative to the service sector and the new “information” sector, and as the technology of transportation and communication has increasingly eroded geographic constraints on product markets and on the location of production.³⁵ The organization of work has changed, as mass production and stable workplace hierarchies have given way to more flexible, customer-centered production methods and semiautonomous team-based organizations.³⁶ And the surrounding legal landscape has changed, as laws regulating substantive terms of employment and granting individual employee rights have proliferated.³⁷ In the meantime, the collectivist premises of the NLRA have acquired the patina of a historic relic. So how is it that no significant reforms have made their way into the statute books since 1959?

Part of the Act’s durability may come from the enduring power of its core provisions, which continue to command a broad political consensus (in principle). The statutory rights of workers under section 7 of the Act to associate, to discuss their grievances, to form a union, and to bargain collectively over terms and conditions of employment appear to be politically untouchable (again, in principle). But many intermediate level doctrines and procedures—some of them embedded in the text, and some of them established by longstanding judicial interpretation—have attracted much criticism and might have warranted another look in the last half-century.

Unions and their allies have been especially critical of the rules and procedures governing union organizing activity and employers’ typically tenacious opposition to that activity.³⁸ The law not only protects employers’ right to express their opposition to unionization;³⁹ it also recognizes

34. Alexis M. Herman, Sec’y, U.S. Dep’t of Labor, Futurework: Trends and Challenges for Work in the 21st Century, Daily Labor Rep. (BNA) No. 170, at E-5 (Sept. 2, 1999) (noting increased representation of women, nonwhites, and Hispanics in the labor force).

35. See Richard Freeman, Is Declining Unionization of the U.S. Good, Bad, or Irrelevant?, in *Unions and Economic Competitiveness* 143, 164 (Lawrence Mishel & Paula B. Voos eds., 1992); George Johnson & Matthew J. Slaughter, The Effects of Growing International Trade on the U.S. Labor Market, in *The Roaring Nineties: Can Full Employment Be Sustained?* 260, 268 (Alan B. Krueger & Robert M. Solow eds., 2001).

36. See generally Michael J. Piore & Charles F. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (1984) (analyzing transformation from “mass production” to “flexible specialization” in manufacturing).

37. See James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 Tex. L. Rev. 1563, 1568–72 (1996) [hereinafter Brudney, *Reflections*] (describing growth of individual employment rights legislation).

38. See Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 495, 516–23 (1993) (citing the critics).

39. See 29 U.S.C. § 158(c) (2000). Before Taft-Hartley, the Supreme Court in *NLRB v. Va. Elec. & Power*, 314 U.S. 469, 477 (1941), suggested that employers had a constitutional right to express “noncoercive” opinions about unionization, and in *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945), it recognized that both employers and unions had that right. Section 8(c) later codified a broad version of this “free speech” protection.

their right to compel employees to listen to them in "captive audience" meetings, while excluding union representatives from the workplace altogether.⁴⁰ Moreover, by granting employers the right to an NLRB election, as opposed to more informal methods of verifying majority support for unionization, the law affords employers time to campaign against union representation, and opens the door to the use of coercive and dilatory tactics.⁴¹ So, too, the law fails to effectively prevent or punish coercive and illegal forms of employer opposition, the incidence of which appears to have risen significantly since the 1970s.⁴² In particular, the Act has been faulted for its paltry and easily delayed remedies for anti-union discharges.⁴³ Those remedies—basically, reinstatement and backpay, minus wages earned in the interim—may be seen as a minor cost of doing business by an employer committed to avoiding unionization.⁴⁴ Yet legislative efforts to fortify the Act's remedies and speed up the representation process have failed.⁴⁵

A frequent target of criticism has been the law's failure to afford unions physical access to the workplace during an organizing campaign.⁴⁶ Unions have argued that their supposedly equivalent opportunity to reach employees in their homes or at union halls has become increas-

40. See Becker, *supra* note 38, at 558–60 (describing the evolution of Board law on "captive audience" meetings).

41. Board-supervised elections are not the only means of demonstrating majority status and securing union recognition; employers may grant recognition voluntarily based on other persuasive evidence of majority support. But elections are, since 1939, the only means of gaining Board certification and of compelling recognition, and, since 1966, the only basis upon which employers can be compelled to bargain. See Becker, *supra* note 38, at 507–15. Delay, or the potential for delay, is built in to the NLRB's election process, with its "campaign period" and procedures for challenging ballots and bargaining unit determinations. *Id.* at 519. Empirical evidence confirms that the delay between petition and election favors employers. See Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 *Berkeley J. Emp. & Lab. L.* 369, 381–82 & n.66 (2001); Myron Roomkin & Richard N. Block, *Case Processing Time and the Outcome of Representation Elections*, 1981 *Ill. L. Rev.* 75, 88.

42. See *Organizing to Win*, *supra* note 10, at 4–5; Richard B. Freeman, *Why Are Unions Faring Poorly in NLRB Representation Elections?*, in *Challenges and Choices Facing American Labor* 45, 53 (Thomas A. Kochan ed., 1985); Weiler, *Promises to Keep*, *supra* note 7, at 1778–81.

43. See Weiler, *Promises to Keep*, *supra* note 7, at 1787–95.

44. See DLL, *supra* note 16, at 2527–29. Repeat offenders who violate judicially enforced Board orders can be subject to contempt proceedings and more significant penalties.

45. See *infra* notes 60–62, 115–118 and accompanying text.

46. That failure was not foreordained by the text. The Act might have been interpreted—and was interpreted by the NLRB until 1956—as affording union organizers access to nonwork, and especially outdoor areas, of the employer's facility; but that interpretation was reversed by the Supreme Court in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113–14 (1956). The Court has since reaffirmed its interpretation and proclaimed it to be as untouchable by the Board as is the text itself. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536–37 (1992).

ingly impracticable in an age of urban sprawl, especially for overextended working parents. At the same time, employers' property rights—and particularly their right to exclude others from property that has been opened to workers, customers, or the public—have been severely eroded by the antidiscrimination laws and regulatory regimes put in place since the 1950s.⁴⁷ Yet efforts to legislate even limited union access to non-work areas of the workplace have failed.⁴⁸

Another much-criticized aspect of the NLRA is the "*Mackay Radio* doctrine,"⁴⁹ under which employees engaged in an economic strike that is "protected" by section 7 are nonetheless subject to permanent replacement by their employer.⁵⁰ The employer's "right" of permanent replacement—established in 1938 by Supreme Court dicta but little used until the 1980s—has become the key to aggressive de-unionization campaigns. It has rendered the strike useless and virtually suicidal for many employees, and has become employers' Exhibit Number One in union organizing campaigns.⁵¹ The doctrine has been excoriated by scholars and by public officials; it has not been overruled by Congress.⁵²

All of these changes have been sought by labor and its allies. Since the Taft-Hartley amendments, employers have had far less to complain about. But they have sought legislative relief from the law's nearly seventy-year-old ban on employer-initiated "employee representation" plans. Employers have been urged and many have sought in recent decades to tap the collective creativity and knowledge, and to respond to the shared

47. In particular, the civil rights laws—those governing employment, housing, and public accommodations—took a big chunk out of the once nearly absolute rights of property owners to exclude others and to place conditions on their entry. See Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 Stan. L. Rev. 305, 311–25 (1994) (tracing development of statutory and common law limits on property owners' right to exclude others where that right conflicts with the rights of others—employees, customers, the general public—whom the owner has permitted on the property).

48. See *infra* notes 58–68 and accompanying text.

49. Named for *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). *Mackay* is an example of how contestable judicial interpretations of the Act become entrenched through congressional inaction.

50. "Permanent replacement" is distinguished from "discharge," which is illegal, by the entitlement of replaced strikers to return to jobs that are unfilled at the end of the strike, and to fill jobs that open later as a result of attrition, discharge, or expansion. *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1368–70 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). For an overview of the rights of replaced strikers, see DLL, *supra* note 16, at 1478–86. "Unfair labor practice strikers," whose strike is provoked or prolonged by the employer's illegal conduct, are not subject to permanent replacement. *Id.* at 1472–78.

51. See, e.g., *Atleson*, *supra* note 33, at 19–34; *Craver*, *supra* note 6, at 29, 132–34, 143–46; Julius Getman, *The Betrayal of Local 14*, at 224–28 (1998); William B. Gould IV, *Agenda for Reform* 185–88, 202–03 (1993); Weiler, *Governing*, *supra* note 5, at 264–69; Michael H. Gottesman, *Union Summer: A Reawakened Interest in the Law of Labor?*, 1996 Sup. Ct. Rev. 285, 293–96; Brudney, *To Strike*, *supra* note 3, at 71–72, 80–81 (reviewing Getman, *supra*).

52. That is not for lack of effort. See *infra* note 63. For examples of scholarly criticism, see *supra* note 51.

interests, of their workforce. Yet federal law—specifically, section 8(a)(2) of the Act—prohibits them from initiating or being involved in any organization of employees that “deals with” the employer regarding terms and conditions of employment. This ban has provoked many trees worth of scholarly criticism and proposals for reform, and has attracted congressional attention; yet nothing has emerged from Congress.⁵³

Another sort of “labor law reform” one might have expected from Congress is the recognition of a role for unions, or for some institution of employee representation, within the numerous federal employment statutes enacted since 1964.⁵⁴ Those statutes recognize that employees play an important role in the enforcement of workplace rights and regulations: They protect employees against retaliation for their participation in enforcement, and often give them the right to sue for enforcement and for individual remedies.⁵⁵ But unions appear primarily as potential wrongdoers under the new statutes, especially the antidiscrimination statutes.⁵⁶ With a few minor exceptions, Congress has assigned no formal

53. On congressional attention, see *infra* notes 64–67 and accompanying text. For a sampling of scholarly criticism, see Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 Colum. L. Rev. 753, 879–983 (1994) [hereinafter Barenberg, Democracy and Domination]; Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 Ariz. L. Rev. 397, 429–31 (1992); Samuel Estreicher, *Employee Involvement and the “Company Union” Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. Rev. 125, 149–55 (1994) [hereinafter Estreicher, Employee Involvement]; Gottesman, *In Despair*, *supra* note 7, at 86–87; Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 Chi.-Kent L. Rev. 149, 187–90 (1993); Sanford M. Jacoby, *Current Prospects for Employee Representation in the U.S.: Old Wine in New Bottles?*, 16 J. Lab. Res. 387, 389–91 (1995); Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA*, 72 S. Cal. L. Rev. 1651, 1706–09 (1999); Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 Chi.-Kent L. Rev. 129, 141–48 (1993); Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. Pa. J. Lab. & Emp. L. 177, 198–200 (2001).

54. On the constructive role that unions could play in the implementation and enforcement of public law, see generally Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. Rev. 169, 171–72, 199–218 (1991).

55. Brudney, *Reflections*, *supra* note 37, at 1568–71.

56. As Professor Brudney put it, the new employment law emerging from Congress “assigns unions cameo appearances or even casts them as villains impeding employees’ economic progress.” *Id.* at 1571. Unions are identified as potential defendants in an action for age discrimination, 29 U.S.C. § 623 (2000); discrimination based on race, sex, religion, or national origin, 42 U.S.C. § 2000e-2 (2000); and disability discrimination, 42 U.S.C. §§ 12111(2), 12112. As for the “cameo appearances,” OSHA regulations call for federal inspectors to consult with union representatives in the course of their duties, 29 C.F.R. § 1960.26(b) (2001); and the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. § 2102(a), provides for unions to receive notice of plant closing or mass layoffs. Unions also have standing to sue for damages under the WARN Act on behalf of their members. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996) (citing *North Star Steel Co. v. Thomas*, 515 U.S. 29, 31 (1995)).

role to employees' collective representatives in identifying violations, monitoring compliance, or tailoring regulatory requirements to particular workplaces.⁵⁷

B. *Explaining Congressional Inaction*

Why has labor law stood still in the face of decades of social, economic, and legal change? Legislative inaction stems primarily from the fact that, for many decades, both organized labor and especially employers have had enough support in Congress to block any significant amendment that either group strongly opposes.⁵⁸ "Enough support" does not mean a majority; it means a minority that is big enough, well organized enough, and committed enough to tie up a bill through the arcane supermajority requirements of the Senate—for example, through filibuster—or to sustain a presidential veto.⁵⁹

So, for example, the Labor Law Reform Act of 1977⁶⁰ sought to address persistent criticism of the overwhelming advantages that employers enjoy in union campaigns by virtue of their power over the workplace and the employees, as well as the original Act's inadequate deterrence of employer misconduct. The Reform Act would have expedited representation proceedings; prescribed injunctive relief and double back pay awards in cases of anti-union discrimination; barred flagrant labor law violators from government contracts; and given union organizers greater access to the work site to respond to employers' anti-union campaigning.⁶¹ The Labor Law Reform bill garnered both majority support and fierce opposition. The latter prevailed: The bill died after a five week Republican filibuster, and six unsuccessful efforts to end debate, in the Senate in 1978.⁶²

57. For examples of these exceptions, see *supra* note 56 regarding unions' cameo appearances in employment law.

58. The ability of cohesive, well organized groups to block legislation can be understood in "public choice" terms. See William N. Eskridge, Jr. & Philip P. Frickey, *Legislation: Statutes and the Creation of Public Policy* 52–57 (2d ed. 1995). Indeed, Eskridge and Frickey identify labor law as a "prime example" of the kind of conflict generated by well organized opposing forces. *Id.* at 55.

59. In addition, and prior, to the examples cited below, a narrowly-targeted bill to relax the law's restrictions on picketing at construction sites, introduced in 1975, H.R. 5900, 94th Cong., 121 Cong. Rec. 10, 012 (1975), passed both the Senate and the House, but failed when the Senate but not the House voted to override President Ford's veto in 1975. See DLL, *supra* note 16, at 66–67 (chronicling history of bill).

60. H.R. 8410, 95th Cong., 123 Cong. Rec. 23, 711–14 (1977); S. 1883, 95th Cong., 123 Cong. Rec. 23, 738 (1977).

61. The bill and its history are described in DLL, *supra* note 16, at 67–68. For a description of the proposals, see Richard N. Block, *Rethinking the National Labor Relations Act and Zero-Sum Labor Law: An Industrial Relations View*, 18 *Berkeley J. Emp. & Lab. L.* 30, 34–35 (1997); Rafael Gely & Leonard Bierman, *Labor Law Access Rules and Stare Decisis: A Developing Planned Parenthood-Based Model of Reform*, 20 *Berkeley J. Emp. & Lab. L.* 138, 146 (1999).

62. See DLL, *supra* note 16, at 67–68.

Similarly, several bills have been introduced since 1989 to overrule *Mackay Radio* and to prohibit the permanent replacement of strikers. In 1992, and again in 1994, bills gained majority support in both houses of Congress, but succumbed to determined and loquacious opposition in the Senate, where it takes sixty votes to end debate.⁶³

Organized labor, too, was able to stymie a congressional majority on the single occasion in recent decades when employers pressed for a significant amendment of the NLRA. The Teamwork for Employees and Managers Act ("TEAM Act") would have loosened the NLRA's ban on employer-sponsored employee representation plans and would have permitted employers to establish non-union "employee participation programs."⁶⁴ Employers claimed that this change would better enable them to compete in the global marketplace.⁶⁵ But organized labor held fast to the New Deal construction of these schemes as vehicles of subtle employer coercion—as additional weapons in employers' already sizable arsenal of anti-union tactics.⁶⁶ The TEAM Act narrowly passed both houses of Congress in 1997, but supporters were unable to override President Clinton's veto.⁶⁷

Even the whiff of "labor law reform" was sufficient to doom proposals for the reform of the Occupational Safety and Health Act that, among other things, would have mandated the creation of workplace health and safety committees at most workplaces.⁶⁸ Such committees might have played a crucial role in extending the reach of an overextended enforcement apparatus—in carrying information about unsafe workplace conditions upward to enforcement agencies and in bringing regulatory requirements down to the shop floor.⁶⁹ But employers strongly opposed

63. See 138 Cong. Rec. S8237 (daily ed. Sept. 24, 1992) (Senate cloture vote fails 57-42); 140 Cong. Rec. S8844 (daily ed. July 13, 1994) (Senate cloture vote fails 53-46); 140 Cong. Rec. S8524 (daily ed. July 12, 1994) (Senate cloture vote fails 53-47).

64. The Teamwork for Employees and Managers Act, S. 295, 104th Cong. (1995) [hereinafter TEAM Act]. The TEAM Act would have amended section 8(a)(2) to allow employers to establish employee participation programs "to address matters of mutual interest (including issues of quality, productivity, efficiency) and which does not have, claim, or seek authority to negotiate or enter into collective bargaining agreements [under this Act] with the employer." Id. § 3.

65. See, e.g., 142 Cong. Rec. S7614, at S7615 (daily ed. July 10, 1996) (statement of Sen. Hatfield) ("To be competitive in today's international . . . market, employees must act in partnership with management.").

66. See Teamwork for Employees and Managers Act of 1997: Hearings on S. 295 Before the S. Comm. on Labor and Human Res., 105th Cong. 49 (1997) (testimony of Jonathan Hiatt, General Counsel, AFL-CIO) (discussing how amendment of section 8(a)(2) would further undermine workers' rights). See generally Carol Brooke, Nonmajority Unions, Employee Participation Programs, and Worker Organizing: Irreconcilable Differences?, 76 Chi.-Kent L. Rev. 1237, 1237-38 (2000).

67. See Clinton Vetoes TEAM Act Despite Pleas from Business for Passage, 152 Lab. Rel. Rep. (BNA) 417, at D-19 (Aug. 5, 1996).

68. See H.R. 1280, 103d Cong. (1993); H.R. 3160, 102d Cong. (1991).

69. The effectiveness of employee safety committees in improving safety has been recognized. See Gregory R. Watchman, Safe and Sound: The Case for Safety and Health

the committees, possibly fearing that independent committees would become a point of entry for union organizing.⁷⁰ Indeed, some unions opposed them as well on the ground that the committees would be dominated by management and would become tools for manipulating employees and opposing union sentiment.⁷¹

A different political process—one that gave less power to cohesive legislative minorities—might have set in motion a process of consultation and compromise and engagement with contemporary economic conditions. Or it might simply have enabled one side or the other—organized labor or business—to have its way. We can envision what Carter-era labor law reform might have looked like because it nearly happened in 1978. We can only imagine what Reagan-era labor law reform might have looked like. Clinton-era reform in a more purely majoritarian system would probably have yielded a ban on permanent replacement of strikers as well as the TEAM Act; that combination might have shaken up labor relations quite dramatically. But who knows what Clinton-era reform might have looked like if it had followed on the heels of Reagan-era reforms?

None of these imagined reforms occurred, however, because existing institutional arrangements make it possible for committed and well organized congressional minorities to block or hijack statutory reforms they oppose. Of course, that begs the question why labor law reform proposals in particular provoke such committed and cohesive opposition. Why

Committees Under OSHA and the NLRA, 4 Cornell J.L. & Pub. Pol'y 65, 82–89 (1994) (pointing to evidence that employee safety committees foster identification, reporting, and abatement of workplace hazards); see also Randy S. Rabinowitz & Mark M. Hager, Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada, 33 Cornell Int'l L.J. 373, 431 (2000) (noting that employee safety committees have potential to improve “safety and health performance[.] . . . increase awareness of hazards, and encourage abatement activity”). See generally Mark Seidenfeld, Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation, 41 Wm. & Mary L. Rev. 411, 497–98 (2000) (recognizing success of employee safety committees in reducing accident rates at California construction sites, but concluding that effectiveness of these committees in other contexts “remains an open question”).

70. See Rabinowitz & Hager, *supra* note 69, at 431 (stating that legislation requiring employee safety committees was “strongly opposed by the business community”); Seidenfeld, *supra* note 69, at 500.

71. See Kenneth A. Kovach et al., OSHA and the Politics of Reform: An Analysis of OSHA Reform Initiatives Before the 104th Congress, 34 Harv. J. on Legis. 169, 175 (1997) (reporting union fears that employer controlled safety committees might become anti-union devices). Professor Seidenfeld neatly captures the way in which polarization over “labor law” issues spills over into other legislative issues involving the workplace:

[U]nion opposition to employer backed labor-management safety committees and industry opposition to committees whose labor representatives are chosen by secret ballot, and whose information regarding safety concerns at individual plants came from sources other than the employer—sources that might include national unions—threaten the emergence of a truly collaborative process for regulating workplace safety.

Seidenfeld, *supra* note 69, at 500.

is it so hard to reach consensus or compromise in this area? Some of the answers—particularly those that emanate from the field of “public choice”—suggest a certain symmetry. In particular, both sides are well organized. There is apparent symmetry, too, in the perceived stakes: Employers are fighting for flexibility and managerial prerogatives that they claim are crucial to their economic survival, while unions are fighting for their very existence in the face of aggressive managerial resistance and long-term attrition. The pitched battle that is enacted in the typical private sector union organizing campaign is projected onto the national political stage in the form of an unusually polarized debate. Only a serious crisis in industrial relations seems capable of breaking through the resulting impasse.⁷²

The seeming symmetry is misleading, however. First, the political playing field is hardly even. The political power of employers to resist labor law reform in Congress is firmly grounded in capital’s indispensability to the society’s economic well-being and in its mobility, or ability to flee the jurisdiction, and is fortified by the unusual unanimity with which business opposes reforms that might facilitate unionization.⁷³ Business is far more united in its opposition to unionization, and to labor law reform that favors unions, than in its opposition to other forms of regulation—even workplace regulation—which often divide large and small employers, or employers in different sectors.⁷⁴ There is also a deeper asymmetry that is reflected not only in the legislative process but in the typical labor dispute: Unions cannot live if they kill their “hosts”; they cannot thrive if employers do not. But employers can thrive without unions; indeed, many would prefer to see unions die out altogether, and are willing to do their part to bring that about. It is hard to find common ground in that sort of contest.

Ultimately, the cause of the congressional impasse is inseparable from its consequences: Organized labor is faltering badly under the existing, antiquated regime, and has a far greater need for an effective labor law, and for law reform, than employers have.⁷⁵ The proof is in the political process: While organized labor has mounted several major efforts at

72. See Alan Hyde, *A Theory of Labor Legislation*, 38 Buff. L. Rev. 383, 445–46 (1990) [hereinafter Hyde, *Labor Legislation*]; James Gray Pope, *The First Amendment, The Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 Rutgers L. Rev. 941, 944–45 (1999) [hereinafter Pope, *Right to Organize*].

73. See Pope, *Right to Organize*, *supra* note 72, at 944–45. On the “privileged position” of business in politics, by virtue of its provision of essential goods and services and its mobility, see Charles E. Lindblom, *Politics and Markets* 175 (1977).

74. Professor Pope puts the point succinctly: “[U]nions can win legislative change when business opposition is divided or less than fully committed—for example, on bills pertaining to general labor issues like unemployment insurance or the minimum wage. But on union-related issues, where business is united and committed, the success rate has been minimal.” Pope, *Right to Organize*, *supra* note 72, at 945.

75. I will have more to say below about the asymmetrical impact of ossification. See *infra* Part IV.B.

labor law reform in the past thirty years, employers—equipped though they are with all of the political advantages of organization, internal unity, access, and wealth—have made almost no such efforts since 1959. For the most part, employers who oppose unions and collective bargaining are willing to bide their time in the political process, batting down periodic reform proposals that might tip the scales in unions' favor, and watching union strength ebb away.

II. OSSIFICATION FROM WITHIN: BUILT-IN OBSTACLES TO CHANGE AND VARIATION

The congressional minority that enacted the Wagner Act did not mean for its hard-won victory to be easily undone; it built in some barriers to change. In particular, Congress sought to insulate the new labor relations regime as much as possible from some highly suspect sources of change and variation—from employers and from the courts—and to entrust the administration of the Act to a new federal agency, the NLRB. But over the course of the past half-century, the built-in obstacles to change have grown anomalous and out of sync with surrounding legal and economic developments, while the Board has become increasingly circumscribed in its ability to adjust the application of the Act to modern conditions.

A. *The Ban on Employer Sponsored Forms of Employee Representation*

One potential avenue of extralegal renewal and experimentation was deliberately shut down by Congress in 1935 and has never been reopened. Employers seeking to meet (or deflect) workers' demands for a voice in their working conditions while advancing their own interests in productivity and profits might have devised—and did devise, before 1935—a variety of alternative mechanisms for employee representation. Those mechanisms might have competed with independent unions for employee loyalty and perhaps spurred innovation within the labor movement. Some of those mechanisms might have won out over independent unionization in some workplaces, even in a fair contest. We might think of this as a “market” mechanism of reform. But the single most controversial provision of the Wagner Act closed down that potential avenue of change.

Company unions—employee organizations that were established and controlled by management—loomed in 1935 as among the chief barriers to independent union representation.⁷⁶ Section 8(2)—now section 8(a)(2)—of the Act thus made it unlawful for an employer “to dominate

76. See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 Harv. L. Rev. 1379, 1443–46 (1993) [hereinafter Barenberg, Political Economy]; Abigail Evans, Note, *Cooperation or Co-optation: When Does a Union Become Employer-Dominated Under Section 8(a)(2) of the National Labor Relations Act?*, 100 Colum. L. Rev. 1022, 1026–29 (2000).

or interfere with the formation or administration of any labor organization." Section 2(5), in turn, defined "labor organizations" broadly to include "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."⁷⁷ The ban thus reached not only organizations that purported to bargain collectively, or that masqueraded as unions, or that operated to coerce employees or discriminate against union activists or to evade the duty to bargain with the labor organization chosen by the majority. It also reached some employee representation plans that were favored by employees and that worked well, by all accounts, within the particular organization.⁷⁸ Of course, there was ample evidence before Congress that many—probably most—employee representation plans were a sham, a pretext for resistance to employee demands for independent representation through unions, and a vehicle for discrimination and coercion against employees who favored such representation.⁷⁹ But why was it not enough to ban employer coercion and discrimination, and to compel employers to bargain with a union chosen by the majority of employees, while permitting representation plans that respected those principles?⁸⁰

In 1935, Congress might have concluded that distinguishing the few freely chosen noncoercive plans from the far more numerous coercive plans presented too murky a factual inquiry, and invited employer efforts to evade the law by muddying those waters.⁸¹ Moreover, even noncoer-

77. 29 U.S.C. §§ 158(a)(2), 152(5)(2000).

78. See Sanford M. Jacoby, *Reckoning with Company Unions: The Case of Thompson Products, 1934–1964*, 43 Indus. & Lab. Rel. Rev. 19, 19, 36–39 (1989). The breadth of the ban was by no means inadvertent. See David Brody, Section 8(a)(2) and the Origins of the Wagner Act, in *Restoring the Promise of American Labor Law* 29, 41 (Sheldon Friedman et al. eds., 1994).

79. See Bruce E. Kaufman, Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment, 17 Yale L. & Pol'y Rev. 729, 735 (1999).

80. Professor Barenberg uncovers a richly layered explanation and justification for the 1935 ban in Senator Wagner's writings and the intellectual currents that informed his view of labor relations. In short, Wagner believed that company unions were uniquely threatening to genuine self-organization because "the cadre of company union representatives under managerial control [was] a political machine that penetrated the social infrastructure of the workforce . . . [and] illegitimately distorted group deliberation and coerced worker choice more systematically than did the nonunion workplace." Barenberg, Political Economy, *supra* note 76, at 1459. But even if this sophisticated and nuanced view can be attributed to the 1935 Congress, it does not clearly justify the continuing ban on alternative forms of employee representation. For his own defense of a reconstructed ban on company dominated unions, Professor Barenberg turns to more contemporary sources in social theory and labor economics. See Barenberg, Democracy and Domination, *supra* note 53, at 825–37.

81. A ban that was triggered by more subjective and intent based criteria than is the current ban would place greater demands on an agency with limited investigative and

cive employee representation plans operated to divert employee interest in independent unionization—to substitute for, even if not to suppress, union sentiment. For a New Deal congressional majority committed to the promotion of collective bargaining through independent labor organizations, those answers may have sufficed to justify the broad ban. One might have expected those answers to fall short for a later congressional majority committed to neutrality and “free choice” with respect to unionization. But even in 1947, the anti-union forces seem to have made the judgment that their prospects for success would be greater if they left the original prohibitions of the NLRA intact, while adding a series of restrictions on unions and recasting the whole package in terms of employee “free choice.”

The result was a choice—constrained and far from free—between full-fledged independent representation and no collective representation. Given the congressional impasse that has solidified since then, employees are still faced with this all-or-nothing choice.⁸² Whether or not this could be justified in 1935, when the President and a congressional majority were set on throwing the weight of the federal government behind a dynamic and growing labor movement, or in 1947, when union representation had quintupled and was still rising, can it be justified now that unionization in the private sector has dropped to ten percent of the workforce?⁸³

enforcement resources; that is hardly irrelevant. But the Board currently devotes so little of its resources to the enforcement of section 8(a)(2) that this does not seem like an adequate defense of the broader, more objective ban that exists.

82. That is a slight overstatement. Some fairly innocuous forms of employee involvement—those in which employees are not “represented” and do not “deal with” employers about “terms and conditions of employment”—are currently deemed acceptable under section 8(a)(2). See *infra* notes 83–100 and accompanying text. “Quality circles” are an example.

83. Most unions and some scholars believe that section 8(a)(2)’s ban is still needed in light of the pervasively coercive nature of employer controlled employee participation plans. Teamwork for Employees and Managers Act of 1997: Hearing on S. 295 Before the S. Comm. on Labor and Human Resources, 105th Cong. 49 (1997) (testimony of Jonathan P. Hiatt, Gen. Counsel, AFL-CIO) (“[M]ounting evidence demonstrates that employee involvement is most effective . . . where workers speak with an independent voice”). See, e.g., A. B. Cochran, III, *We Participate, They Decide: The Real Stakes in Revising Section 8(a)(2) of the National Labor Relations Act*, 16 *Berkeley J. of Emp. & Lab.* L. 458, 467 (1995) (noting that some commentators view employee representation committees as part of “management’s arsenal assembled to vanquish unions”); Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 *B.C. L. Rev.* 499, 548–51 (discussing continued importance of collective bargaining model as protected by section 8(a)(2)). James Rundle, *Winning Hearts and Minds in the Era of Employee-Involvement Programs*, in *Organizing to Win*, *supra* note 10, at 213 [hereinafter Rundle, *Hearts and Minds*], offers empirical evidence that employee involvement programs (EIPs) were associated with more aggressive employer opposition to organizing campaigns, and with lower rates of union success (even after accounting for the more aggressive tactics and other factors). *Id.* at 218–20. Many scholars argue for at least a narrowing of section 8(a)(2). See sources cited at *supra* note 53.

Both employees and employers have reason to question the continuing justification for the broad prohibition of section 8(a)(2). Even the diluted and domesticated forms of employee voice that are likely to be initiated by employers may be better than no collective employee voice at all for the ninety percent that is unorganized. And many employers have become convinced of the productivity benefits, even the necessity, of employee involvement in workplace decisionmaking.⁸⁴ The law's constraints are increasingly difficult to justify as employers' interest in promoting employee involvement in the full range of decisions relevant to quality and productivity has less and less (though often still something) to do with the avoidance of unionization.

Let us first look a little more closely at the scope of section 8(a)(2)'s ban. It prohibits employers from operating "any organization of any kind" through which employees "deal with" employers over terms and conditions of employment. The Supreme Court long ago declined to construe "deal with" narrowly to reach only bargaining or the equivalent.⁸⁵ The ban thus includes any "bilateral mechanism involving proposals from [an] employee committee" concerning terms and conditions of employment, including safety, pay, attendance, scheduling, promotion policies, etc.—"coupled with real or apparent consideration of those proposals by management."⁸⁶ It is not unlawful for an employer to initiate such a mechanism, but it is unlawful for the employer to prescribe a committee's structure and formation, to place management representatives on a committee, or to maintain any ongoing control over it.⁸⁷

Supporters of the ban point out that the law does permit some forms of employee involvement. It permits programs aimed at improving "quality" and "productivity," as long as they do not deal regularly with terms and conditions of employment—that is, employee compensation, schedules, job descriptions, promotion policies, and any number of issues that are unavoidably implicated in the more efficient organization of production.⁸⁸ The law also permits one-way communication and suggestion schemes, as long as they do not involve give-and-take between employees

84. See Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 U. Pa. J. Lab. & Emp. L. 121, 133–35 (2001).

85. See *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 210–11 (1959).

86. *Electromation, Inc.*, 309 N.L.R.B. 990, 995 n.21 (1992), enforced, 35 F.3d 1148 (7th Cir. 1994).

87. *Id.* at 995.

88. See, e.g., *Simmons Indus.*, 321 N.L.R.B. 228, 254 (1996) (holding that two employer-dominated committees violated section 8(a)(2), but that a third, whose focus was "the quality of product and not the needs or convenience of employees," did not); *Vons Grocery Co.*, 320 N.L.R.B. 53, 68–69 (1995) (holding that company's "Quality Circle Group" did not violate section 8(a)(2) because the committee was "solely involved in operational matters"); *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, 243–44 (1985) (holding that committee was a "management tool . . . intended to increase company efficiency" and therefore did not violate section 8(a)(2)).

and management.⁸⁹ And it permits schemes that go so far as to delegate to groups of employees full managerial authority over hiring, scheduling, promotions, discipline, or other employment issues.⁹⁰ In short, it makes room for schemes that allow employees to do either more or less than “deal with” employers; but it does not permit employer sponsorship of institutionalized forms of give-and-take, consultation, or negotiation over the things that matter most to employees at work. It rules out a wide swath of potentially valuable forms of employee involvement in workplace decisionmaking.

A curious but common defense of section 8(a)(2) rests on serious doubts about its efficacy. It is indeed unclear how much the ban on employee representation plans really binds employers. As long as there is no union and no fearless aggrieved employee on the scene, unfair labor practice charges are unlikely, and liability even less likely.⁹¹ Moreover, the remedial consequences of maintaining an employer-dominated labor organization is merely “disestablishment” of the organization; here as elsewhere, the Board lacks the power to punish violations of the Act. In view of the low risk of a legal challenge, the limited penalties, and the benefits of employee voice both as a possible union-avoidance device and as a spur to productivity, employers appear to be experimenting with a range of alternative forms of employee representation notwithstanding the legal prohibition.⁹² Some plans pretty clearly violate the ban; others push the limits of legality.⁹³

89. Polaroid Corp., 329 N.L.R.B. 424, 429 (1999); E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 894–97 (1993).

90. See Crown Cork & Seal Co., 334 N.L.R.B. No. 92, slip op. at 3 (2001); General Foods Corp., 231 N.L.R.B. 1232, 1235 (1977).

91. From 1972 to 1993, the NLRB ordered the disestablishment of only fifty-eight illegal employer-dominated organizations. In 76% of those cases, charges were filed during an organizing campaign; most of these cases involved additional unfair labor practices. Most of the remaining orders involved committees that had been set up alongside existing unions that were being used to circumvent the union, which is an illegal refusal to bargain as well as a violation of section 8(a)(2). Rundle, *Hearts and Minds*, *supra* note 83, at 213, 214. Even when unions do confront employee involvement programs in the context of organizing campaigns, charges may be the exception. Rundle found that 32% of the campaigns he studied encountered such programs, that most of those appeared to be illegal, but that section 8(a)(2) charges were filed in only a small fraction of those cases. *Id.* at 218, 224–25.

92. The evidence appears to be scant and mixed, but some scholars claim the law has little effect on employers’ willingness or ability to institute “employee involvement” programs. See Michael H. LeRoy, *Employee Involvement Programs and Section 8(a)(2): A Survey of Employer Practices*, in *Employee Representation in the Emerging Workplace: Alternative/Supplements to Collective Bargaining*, Proceedings of the N.Y.U. 50th Annual Conference on Labor 141, 153 (Samuel Estreicher ed., 1998) [hereinafter *Employee Representation*]; James R. Rundle, *The Debate Over the Ban on Employer-Dominated Labor Organizations: What is the Evidence?*, in Friedman, *supra* note 78, at 161, 164. Others claim that the law does discourage and constrain such plans. See Kaufman, *supra* note 79, at 777–79.

93. See Kaufman, *supra* note 79, at 774–80. An interesting case was the Employees’ Committee (EC) at Polaroid Corp., which operated from the late 1940s until 1992,

On the other hand, there is evidence that employers would expand employee representation programs if it were not for the constraints of section 8(a)(2).⁹⁴ It is no small matter for an employer to be ordered to dismantle a program to which it has committed organizational resources and managerial credibility.⁹⁵ At a minimum, the ban is bound to inhibit the open exchange of information about these plans.⁹⁶ So even though a good deal of experimentation with employee participation is apparently taking place, its scope and diffusion is almost certainly inhibited by the nearly seventy-year-old ban on “company unions.”

What might have been under a narrower company union ban is hard to guess. But one could imagine, in place of the existing ban, a doctrine that charged the Board with detecting elements of coercion or discrimination in such plans, and that policed their use to evade union organizing.⁹⁷ Employer-sponsored employee representation plans might, for example, be treated like other benefits of employment: The employer would be free to offer or implement such a plan (provided it was free of coercion and discrimination) before the advent of union organizing, but not thereafter.⁹⁸ Just as employers are free to raise wages and improve

apparently with widespread support from employees. See Ann G. Leibowitz, The “Non-Union Union”?, *in* Employee Representation, supra note 92, at 235, 240–48. But “despite its indisputable illegality, it was never subject to a § 8(a)(2) charge.” Laura W. Stein, What Can “Non-Unions” Do?: A Response to Ms. Leibowitz and Professor Hyde, *in* Employee Representation, supra note 92, at 267, 270.

94. Stein, *supra* note 93, at 270; see also *id.* at 273–75 (discussing further section 8(a)(2)’s impact on employee representation programs).

95. *Id.* at 275.

96. Greater dissemination of information and experience would help to resolve rampant uncertainty about which mechanisms of employee involvement and joint decisionmaking best promote productivity and innovation. Yet that exchange of information is almost certainly inhibited by the illegality of some of the most promising forms of employee involvement.

97. This may be more difficult than it seems. Even seemingly “progressive” employee involvement programs may be used “to identify and harass pro-union employees, pit worker against worker, and ‘socialize the workforce into accepting the anti-union message.’” Rundle, Hearts and Minds, *supra* note 83, at 215 (quoting Guillermo J. Grenier, *Inhuman Relations: Quality Circles and Anti-Unionism in American Industry* xviii (1998)). At a minimum, policing a narrower ban would require a greater commitment of resources to the investigation of subtle forms of coercion and intimidation embedded in these programs, and of difficult issues of timing (for example, when employer learned of possible organizing activity), both of which the employer would seek to obfuscate. There is a serious question whether the Board is equipped to undertake this greater burden. One might respond that the ban is barely enforced now. But in the context of an organizing drive, it is relatively straightforward for a union to challenge a plan that appears to be an obstacle to unionization.

98. Employers’ grant of benefits during a union representation campaign has long been held to constitute unlawful interference with employees’ right to organize:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964).

working conditions in order to keep employees content in a non-union environment, they would be free to offer representative mechanisms that might be perceived as alternatives to unionization, as long as they did so before employees had begun actively to explore union representation.⁹⁹ That would limit the extent to which alternative forms of employee representation could be used as a club against unionization.¹⁰⁰

Any significant narrowing of section 8(a)(2) would produce more experimentation with new forms of employee voice. The plans would be employer initiated and would presumably be designed to give employees some voice while retaining managerial control. They would be “cooperative,” and arguably coopted, by design. But that is roughly what most employees say they want, according to the findings of Richard Freeman and Joel Rogers: Over seventy percent of all workers surveyed believed that an employee organization could be effective only with management cooperation, and over eighty percent of nonmanagerial employees preferred an employee organization that was “run jointly” by employees and management.¹⁰¹ Indeed, nearly sixty percent preferred “joint employee-management committees that discuss and resolve workplace problems,” a form of organization that is clearly illegal in the non-union workplace under section 8(a)(2).¹⁰² Of course, those employee preferences are at least partly a product of managerial resistance to independent employee representation, and the price employees anticipate paying for that resistance.¹⁰³ But the overwhelming sentiment among employees for “cooperative” and “jointly run” mechanisms of collective employee influence must give pause to the defenders of existing law.

Employer-initiated plans might well promise more than they deliver; they might give the appearance of influence without any real power to effect change. But that is something employees are likely to discover for themselves. As long as they remain free to explore the union alternative, it is hard to see why employees need to be protected from representation

99. Others have proposed tying the illegality of employee representation schemes to their timing and the presence of union activity. See Estreicher, *Employee Involvement*, *supra* note 53, at 150–52; Gottesman, *In Despair*, *supra* note 7, at 87.

100. But see *supra* note 97 (discussing difficulties of policing a narrower ban on company unions).

101. See Freeman & Rogers, *supra* note 2, at 56–57, 142. A bare majority (52%) of nonmanagerial employees also preferred that the committee provide staff and financial support. At the same time, there was widespread—though less overwhelming—support for a degree of independence in the form of elected employee representatives (preferred by 59%), resolution of disputes by outside arbitrators (59%), and some entitlement to confidential information (47%).

102. *Id.* at 152.

103. *Id.* at 60–63; Gottesman, *In Despair*, *supra* note 7, at 62–68. There is ample evidence that employee opposition to or ambivalence about unionization is a product not only of fear of reprisals but of anxiety about confrontation and conflict, which employers commonly predict—and then insure—will follow from unionization. See Larry Cohen & Richard W. Hurd, *Fear, Conflict, and Union Organizing, in Organizing to Win*, *supra* note 10, at 181.

plans that may turn out to be ineffectual. Indeed, unions might find rich organizing opportunities in the wake of failed or disappointing employer initiated representation plans. For employers might find that it is not so easy to cabin employee voice once it is tapped.¹⁰⁴ It is worth recalling the history of pre-NLRA employee representation plans escaping employer control and evolving into independent unions.¹⁰⁵ In any event, some collective voice seems preferable to none, which is what ninety percent of the private sector workforce has under the current all-or-nothing regime.

On the other hand, maybe the unions are right. Eliminating or significantly narrowing the ban on employer-dominated labor organizations might simply deal management additional trump cards in the fight to remain non-union and accelerate the decline of genuine independent employee representation. The issue of section 8(a)(2) reform is complex, plagued by limited and conflicting empirical evidence, and loaded with symbolic import, and I do not pretend to have proffered, much less justified, a reform proposal. In any event, however, the choice made by Congress in 1935 has clogged if not blocked the proliferation of employer-initiated forms of employee participation. It has impeded what we might call a market response to both employee and employer demands for viable forms of employee representation in workplace decisionmaking. Of course that is what the original Wagner Act set out to do. And that choice, whether or not it serves us well almost seventy years later, remains in effect.

B. *The Lack of a Private Right of Action to Enforce Employee Rights*

For the modern observer of the law of the workplace, an obvious and prolific channel of law reform is private litigation. Costly and burdensome though it may be, litigation is a powerful cauldron of legal change, in which aggrieved individuals combine forces with zealous attorneys to test out new legal theories on sometimes receptive and sometimes creative courts. The aggregate impact of private litigation under broadly worded federal and state statutes and hospitable common law doctrines

104. My conversations with management attorneys suggest that employers do fear giving employees a "taste" of influence and a sense of entitlement that outrun management's willingness to satisfy it, and that this partly accounts for employers' reluctance to institute these plans. To that extent, the effect of narrowing the scope of section 8(a)(2) may be limited.

105. Professor Barenberg reviews the perception, the theory, and the evidence that employer dominated unions in the 1930s had the unintended effect of "spurring collective action." Barenberg, *Democracy and Domination*, *supra* note 53, at 831–35. Company unions could "whet the appetite" of workers for greater power, enhance workers' ability to recognize and articulate shared interests, legitimize ideas of democracy and participation in the workplace, and form the germ of an independent organization. *Id.* Both managers and union leaders were heard to articulate each of these possibilities. *Id.*; see also Brody, *supra* note 78, at 36 (employer-initiated committees "did foster local leadership and, insofar as they failed to produce results, did educate workers and strengthen the case for collective bargaining by outside unions").

has utterly transformed the landscape of “employment law,” and has drawn the anxious attention of employers seeking to avoid its snares. But that has not happened within labor law. If employment law has electrified employers, labor law has proven to be a rather low-voltage instrument. Why?

The answer does not lie in overly restrictive statutory language. The language of section 7’s declaration of employee rights is capacious,¹⁰⁶ and the open-textured prohibitions of section 8 against interference, restraint, coercion, and discrimination hardly resist a generous reading. The low-voltage quality of labor law rights lies not in the statutory articulation of those rights but in the law’s enforcement scheme.

The NLRA represents a very early and important “wrongful discharge” law. It was the first major inroad on what had been, during the *Lochner* era, employers’ constitutional right to fire employees for good reason, bad reason, or no reason at all. Enacted in an era of upsurging confidence in the administrative state and ingrained distrust of courts, it contains no private right of action. Rather, an aggrieved person may file a charge with the NLRB’s prosecutorial arm, which makes an unreviewable decision whether to file an unfair labor practice complaint with the Board.¹⁰⁷ The New Deal choice of administrative rather than judicial adjudication largely dictated the range of remedies: reinstatement, backpay, and other equitable remedies, but not compensatory or punitive damages of the sort that only juries could award.¹⁰⁸

The original choice of administrative enforcement is understandable. In 1935, the courts were the last places to which New Dealers and union activists would have turned for the enforcement of labor rights.¹⁰⁹ On the contrary, much in the Act was shaped by its framers’ aim of keeping the role of courts—and especially the lower courts that were so tarnished by the history of the labor injunction—to a constitutional mini-

106. See *supra* note 18 and accompanying text.

107. 29 U.S.C. § 153(d) (2000). On the unreviewability of the General Counsel’s prosecutorial discretion, see *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

108. This link stems from the constitutional guarantee of a jury trial for civil claims seeking damages. See Michael Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 Yale J. on Reg. 355, 360–61, 408 (1990) [hereinafter Gottesman, Preemption]. The choice of administrative enforcement also limits in practice the availability of preliminary injunctive relief; the agency cannot possibly seek injunctive relief in the more than ten thousand discrimination cases filed annually. See *id.* at 370–71. On the other hand, it must be noted that in contempt proceedings—where a party has violated a judicially enforced order, e.g., to cease and desist from firing union activists at a particular location—additional compensatory and punitive, and sometimes downright creative, remedies are available. See, e.g., *NLRB v. J.P. Stevens & Co.*, 563 F.2d 8, 13 (2d Cir. 1977) (approving large fines and other remedies, including union access, against “the ‘most notorious recidivist’ in the field of labor law”).

109. On the history of judicial antagonism toward labor activity, see William Forbath, *Law and the Shaping of the American Labor Movement* 59–66 (1998) [hereinafter Forbath, Shaping].

mum.¹¹⁰ Even apart from this history, a private right of action to enforce employee rights would have been thought quite worthless, and certainly less potent than the chosen remedy of enforcement by a federal agency.

Since the original choice of administrative remedies and procedures was made, however, wrongful discharge law has come into its own.¹¹¹ The Civil Rights Act of 1964,¹¹² which included both private and administrative remedies, ushered in an era of expanding employment legislation and litigation, especially under the aegis of the antidiscrimination principle.¹¹³ The availability of attorneys' fees and of substantial damages under a growing array of federal and state statutes spawned the growth of a small but energetic plaintiffs' bar in the private and nonprofit sectors. Litigants and their attorneys successfully advocated the adoption of broader theories of liability such as "disparate impact" and discriminatory harassment and successfully utilized aggregative procedures such as the class action and statistical means of proof.¹¹⁴ In the meantime, partly spurred by these doctrines, state courts began to develop common law doctrines of wrongful discharge in violation of public policy; these doctrines carry the threat of tort damages and are often able to attract private counsel. Both discrimination actions and state wrongful discharge actions occasionally generate the kind of six or seven figure verdicts that get employers' attention.

Yet the explicit and longstanding federal public policy favoring workers' freedom of association and self-organization, and banning employer retaliation for the exercise of that freedom, is backed only by an administrative complaint procedure and a comparatively paltry financial threat.¹¹⁵ On the other side, the perceived value of remaining non-union

110. Due process demanded provision for judicial review, but trial courts were largely bypassed. It was employers and their advocates who sought a larger role for courts in unfair labor practice proceedings. Indeed, when the Act was amended in 1947 to ban certain union conduct, employers did get access to the courts: Employers may sue directly under section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, for damages caused by illegal secondary picketing. The Taft-Hartley Act's authorization of federal suits for enforcement of collective bargaining agreements, 29 U.S.C. § 301, has in fact generated a federal common law of labor contracts with some vitality—for example, doctrines defining the deference due to labor arbitration, and the unions' "duty of fair representation." But these developments have left untouched the administrative scheme for enforcement of basic employee rights under the NLRA.

111. See Weiler, *Governing*, *supra* note 5, at 233–41.

112. 42 U.S.C. §§ 2000e–2000e17 (2000).

113. The Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213, continued the expansion of employment litigation.

114. The Supreme Court upheld the disparate impact theory in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). It first vindicated the claim that sexual harassment was a form of discrimination in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64–65 (1986). The Court affirmed the probative value of statistical evidence in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977).

115. The paltriness of the threat posed by backpay remedies is further insured by the relatively low wages of the rank and file workers most affected by the Act, as well as by the

gives management a huge incentive to try to squelch an incipient union drive by firing an early union advocate or two before the drive gains momentum. The weakness of the Act's remedies in the face of employer resistance has proven to be the Achilles' heel of employee rights. Notwithstanding their expansive expression and rather far-reaching substantive interpretation, employees' section 7 rights are notoriously under-enforced.¹¹⁶ The right to be free from coercion and retaliation based on union organizing or other collective dissent is widely flouted by employers, who perceive too great an economic threat in the rumblings of union talk and too easy and cheap a response in the discharge of union adherents.

Federal law provides not only inadequate remedies and inadequate deterrence; it also, as we will see below, effectively shields employers from damages actions by preempting state remedies for anti-union discharge.¹¹⁷ In fact, the NLRA's ban on anti-union discrimination appears to be the only "wrongful discharge" under federal law for which compensatory damages are entirely precluded—i.e., for which only an administrative remedy is prescribed *and* state wrongful discharge remedies are preempted.¹¹⁸ As things stand, employers can treat the small and confined risk of an unfair labor practice charge as a minor cost of doing business.

So one relatively simple labor law reform—one that would be in keeping with the changing landscape of American employment law—would be the creation of a private right of action for anti-union dis-

Board's longstanding rule requiring mitigation and the subtraction of wages earned by the employee during the backpay period. DLL, *supra* note 16, at 1841–42.

116. See Freeman & Kleiner, *supra* note 7, at 351–54; Weiler, *Promises to Keep*, *supra* note 7, at 1771–1803. For an illuminating set of "case studies" of employers' anti-union campaigns and the law's inadequate response, see generally Richard W. Hurd & Joseph B. Uehlein, *Patterned Responses to Organizing: Case Studies of the Union-Busting Convention*, in *Restoring the Promise of American Labor Law*, *supra* note 78, at 61.

117. See *infra* notes 201–204 and accompanying text.

118. Many federal laws prohibit retaliation against employees who participate in enforcing those laws or who exercise rights under those laws. See *supra* note 55 and accompanying text. Some, like section 510 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140, provide a private right of action for damages and do preempt parallel state law remedies. See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 133–34 (1990) (holding that ERISA preempts state common law claim of unlawful discharge based on desire to avoid contributing to employee's pension fund). Others, like the antidiscrimination laws, provide a private right of action and do not preempt state remedies. See, e.g., Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(f), 2000e-7 (establishing civil right of action and declaring nonpreemption of state law). Others, like the Occupational Safety and Health Act and the environmental laws, provide only an administrative remedy for whistleblowers but do not preempt parallel state law remedies. See, e.g., *Schweiss v. Chrysler Motors Corp.*, 922 F.2d 473, 473 (8th Cir. 1990) (holding that Pennsylvania common law claim of wrongful termination is not preempted by federal law under OSHA); *Kilpatrick v. Del. County Soc'y for Prevention of Cruelty to Animals*, 632 F. Supp. 542, 548 (E.D. Pa. 1986) (holding that Pennsylvania common law claim of wrongful termination is not preempted by federal law under OSHA). Only the NLRA, so far as I know, provides only an exclusive and preemptive administrative remedy that does not include a private action for damages.

charges.¹¹⁹ The availability of fully compensatory remedies, including attorneys' fees and exemplary damages in egregious cases, would give greater bite to the law.¹²⁰ It would draw the private bar—with its prodigious entrepreneurial energies—more deeply into the enforcement process. Private plaintiffs and their attorneys, even if their claims were based on the same NLRA provisions, would turn far more readily than the NLRB and its General Counsel to legal arguments drawn from outside NLRA jurisprudence—analogies to other laws' schemes of proof, for example, or arguments based on constitutional or even international law—and to challenge that jurisprudence. Moreover, a private right of action would allow private parties, rather than an overtaxed federal agency, to seek preliminary injunctive relief, which has the potential to redress the often irreparable harm to an organizing effort that is inflicted by the discharge of a leading union activist.¹²¹

Of course, a private right of action would also draw courts more deeply into the adjudication and enforcement of labor rights. Such a reform would find few friends among the federal judiciary, already audibly groaning under the growing burden of employment litigation. But that very burden attests to the judiciary's vastly increased experience in recent decades with enforcing employee rights. Minimizing the judicial role seems less important now than it did in 1935, given that experience and the changing composition of the judiciary.¹²² Moreover, the availability of damages would insure a role for juries as well as judges.

119. As under Title VII, the employee might first be required to file a charge with the Board; she might then be granted a right to sue if the Board did not decide to proceed on her behalf within a short period or a right to intervene as a party if the Board did proceed. The Board's interpretations of the governing statute would be accorded Chevron deference if reasonable. Given the importance of timely preliminary injunctive relief in the context of union organizing campaigns, there would have to be some provision for individuals to seek injunctive relief without awaiting the Board's decision whether to proceed. A partial reform along these lines would permit states to afford remedies for anti-union discrimination—for example, under a common law doctrine of wrongful discharge in violation of public policy. This would require either legislative or judicial retreat from longstanding federal preemption doctrines to which we will turn below. See *infra* Part III.A.

120. Exemplary damages would almost certainly be necessary to achieve a real deterrent effect, given the relatively limited economic damages that low-wage employees would suffer and the large payoff that employers may anticipate from stopping an incipient union drive in its tracks.

121. See Gottesman, *Preemption*, *supra* note 108, at 370–71.

122. That is not to say that courts can be counted on to play an entirely constructive role or one that is fully supportive of the NLRA's premises. See *infra* notes 246–251 and accompanying text. But for one encouraging piece of evidence, note that, in their review of NLRB decisions, the courts have been comparatively friendly to employees (and deferential to the Board) in individual anti-union discrimination cases—the most individualistic of NLRA claims and the ones that would be primarily at issue in private actions. See Brudney, *Reflections*, *supra* note 37, at 1582 (reporting that courts have reversed NLRB's section 8(a) actions, and suggesting that this may reflect a "sympathy for individual rights combined with a distrust for collective action").

There would be something paradoxical about extending the “tortification” of employment law—the highly individualistic, legalistic, and compensatory approach to workplace disputes that has come to dominate the law of employment—into the heart of the New Deal scheme of collective empowerment. But a tort-based approach to anti-union discrimination might help to counter the incentives that lead anti-union employers to resort so readily to anti-union discharges in the face of a union drive, and it might serve as an avenue for legal innovation from the individual targets of anti-union reprisals, together with their lawyers. Tort law, with its commitment to deterrence and compensation, and the decentralized entrepreneurial energy of the plaintiffs’ bar, might supply some of what is missing from the enforcement of workers’ associational rights.

It is worth pausing to consider what “deterrence” would mean in this context. If employers were effectively deterred from pursuing the path of intimidation and suppression of employees’ efforts to organize a collective voice, they might be forced either to deal with a union or to supply on their own some of what employees might hope to achieve through unionization. They might be forced to take “precautions,” not only against anti-union discharges that could lead to expensive lawsuits, but against the discontentment that fuels pro-union sentiment. They might even be forced to afford alternative avenues for employee voice, to the extent that the law permitted them to do so.¹²³ Having seen the power of antidiscrimination law and harassment law to reshape workplace practices—witness the proliferation of internal dispute resolution procedures—we should not underestimate the potential for tort-like liability to stimulate productive institutional change.¹²⁴

Consider, for example, how the jurisprudence of discriminatory harassment has grown out of the bare statutory ban on “discrimination in . . . conditions of employment” in Title VII.¹²⁵ Women experiencing unwelcome sexual demands from their bosses, or hostile and abusive treatment at the hands of co-workers, gained the backing of lawyers and feminist theorists and gradually persuaded the federal courts that discrimination did not always take the form of a discharge, the denial of a promotion, or a pay disparity. Employers fearing costly harassment litigation have in turn produced a veritable flood of antiharassment policies and procedures that have transformed many American workplaces. The doctrine has recently been refined to further encourage employers to put in place internal rules and structures that effectively prevent or redress harassment.¹²⁶

123. See *infra* text accompanying notes 296–298.

124. For a close look at some of the most elaborate internal antidiscrimination regimes and their relation to external law, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 489 (2001).

125. 42 U.S.C. § 2000e-2 (2000).

126. The Court has recognized an affirmative defense by which employers can escape liability for most workplace harassment that does not involve a tangible job action if they

A private right of action for anti-union discrimination might generate a similarly creative dynamic among fired union activists, unions, lawyers, legal academics, and judges faced with these claims. One can imagine, for example, a claim for “hostile anti-union environment” arising out of the ban on anti-union discrimination. It is a short leap from there to the recognition of an “affirmative defense” based on the employer’s maintenance and dissemination of policies and procedures aimed at assuring employees of their right to associate and discuss work-related concerns, including unionization. One can imagine a scheme of indirect proof of discriminatory intent in individual cases, or of statistical proof of a “pattern and practice” of anti-union discrimination, or of “disparate impact” liability, all drawing by analogy from Title VII caselaw.

Of course, one can only imagine these things, for there is no private right of action for anti-union discrimination under the NLRA; nor has there been a groundswell of support for creating one, even as wrongful discharge doctrines have proliferated in recent decades. Why is that? The dim prospects for such a reform may reflect something more than the general deadlock over labor legislation; it may suggest a disconcerting truth about the status of labor rights in American political life. The underenforcement of labor’s basic rights, and the political inertia in the face of that underenforcement, may reflect ambivalence about the wrongfulness of anti-union discrimination. Certainly anti-union discrimination does not arouse the same moral indignation as a racially discriminatory discharge, or a discharge based upon sex, age, or disability; discrimination based on immutable traits and aspects of identity that are irrelevant to job performance is simply regarded as more unfair than discrimination based on voluntary activity that may actually inflict harm on the employer.¹²⁷ But in recent decades, other voluntary activities that the employer rationally opposes—“whistleblowing,” assertion of legal claims

have “exercised reasonable care to prevent and correct promptly any sexually harassing behavior.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998). Antiharassment policies and complaint procedures are the most obvious means of meeting this standard.

127. The greater political resonance of rights against trait- or status-based discrimination over rights against retaliation for conduct may be illustrated by Congress’s response to the Supreme Court’s treatment of mixed motive cases under Title VII in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 (1989). *Price Waterhouse* had tracked established precedents under the NLRA, NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 403 (1983), and the First Amendment, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977), in holding that the employer prevails, and avoids liability, by proving that it would have made the same employment decision even in the absence of the impermissible motive. *Price Waterhouse*, 490 U.S. at 244–45. But the civil rights bar succeeded in lobbying Congress for a more generous standard under Title VII: An employer who has acted in part out of a discriminatory motive has acted illegally, and may be liable for attorneys’ fees and declaratory and injunctive relief, albeit not for individualized relief such as reinstatement and backpay. Civil Rights Act of 1991, Pub. L. No. 102-166 (adding 42 U.S.C. § 2000e-5(g)(2)(b)(i)–(ii)) (codified as amended by H.R. 1, 102d Cong. § 5(b)(1991)(enacted)).

against the employer, political activities contrary to the employer's interests—have gained protection in the form of a tort action for wrongful discharge. Some of this conduct is protected based on the public interest, and some on a fundamental right of the employee. Both claims might be made on behalf of the fired union activist. But the right to organize a union has not managed to maintain the aura of fundamentality, the close kinship with civil and political rights, or the association with the public interest that it once had. In the expanding landscape of employer liability for wrongful discharge, the virtual slap on the wrist that is associated with the flouting of employees' federal associational rights is anomalous. But that anomaly may reflect more than an accident of history; it may reflect a more enduring and troubling ambivalence in American political culture toward the value of employees' basic statutory rights of association and self-organization. This is an issue to which we will return below.

The "tortification" of American employment law is hardly a panacea, and its extension into labor law would be incongruous and potentially disruptive.¹²⁸ But the question at hand is not so much whether this private right of action would be a good thing, but what changes it might have led to. "What might have been" if labor law had kept up with the times and added a private right of action for anti-union discrimination that the law already condemns? We might have had a "common law" of anti-union discrimination, with cross-fertilization from other wrongful discharge doctrines. And if the resulting doctrines and remedies packed enough of a punch, they might have induced employers to choose carrots over sticks in fighting unionization, or even to let employees decide the matter for themselves. It might, in other words, have helped to do what the law already purports to do. That would have shaken up labor relations considerably.

C. *Tying Up and Tying Down the Board: Judicial Review and Other Obstacles to Reform from Within*

So an integral element of the original Wagner Act scheme was to confine the role of courts and to concentrate the power to interpret and enforce the Act in the NLRB. The choice to bypass trial courts and preclude private litigation in the enforcement of employee rights remained entrenched even as evidence mounted that, in the adjudication of private lawsuits, courts could play a powerful and progressive role in the realization of employee rights. In the meantime, the role that appellate courts play in the administration of the Act through their judicial review and enforcement of the Board's orders has proven to be one of the primary impediments to the Board's effectiveness as an agent of change from

128. It has not been high on the congressional wish list of organized labor, which craves stronger remedies but generally still trusts the Board more than the courts with their administration.

within the existing legal scheme. The Board's ability to keep the Act up to date is severely constrained by a combination of statutory language, stare decisis, and second-guessing by Congress and especially the courts.

Sometimes the statutory text itself quite "plainly" stands in the way of agency innovation, as in the case of section 8(a)(2).¹²⁹ The Board has sought to make as much room as possible for noncoercive employee participation plans, but the room that is available is sharply constrained by the broad language of the original Act, as well as by old Supreme Court interpretations of that language that decline to narrow it.¹³⁰ In light of those constraints, the Board has proclaimed itself powerless to introduce greater flexibility into the Act.¹³¹ Obviously, statutes are meant to constrain innovation; very old statutes may simply bind more tightly.

Many of the crucial provisions of the NLRA are written in open-textured language, however, and are manifestly open to a range of interpretations. In principle, the courts are instructed to defer to "reasonable" interpretations of the Act by the NLRB, and not to substitute their own judgment.¹³² Part of the justification for this deference lies in the flexibility it affords the implementing agency to adjust to changing condi-

129. Section 8(a)(2) makes it unlawful for an employer "to dominate or interfere with the formation or administration of any labor organization." 29 U.S.C. § 158(a)(2) (2000). Section 2(5) defines "labor organization" broadly to include "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Id. § 152(5).

130. In *Cabot Carbon v. NLRB*, 360 U.S. 203 (1959), the Court declined to give a narrow reading to the statute's broad definition of the "labor organizations" in which employers may not interfere; in particular, the Court declined to read "deal with" to refer only to a bargaining relationship. Id. at 211. Previously, in *NLRB v. Newport News Shipbuilding & Drydock Co.*, 308 U.S. 241, 244 (1939), the Court gave a broad reading to the prohibition of "employer domination."

131. *Electromation, Inc.*, 309 N.L.R.B. 990, 996–98 (1992).

132. The Board has long been held to be entitled to deference in its interpretation of the open-textured provisions of the Act. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944). In fact, the Court varied in the deference accorded the NLRB's statutory interpretations; for example, the Hearst decision was followed just a few years later by another denying deference in light of the NLRB's "inconsistency." *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947). Eventually, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), held that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" charged by Congress with the administration of the statute. Id. at 844. The ruling applied most clearly to formal rulemaking; its application to formal adjudications by the NLRB was generally assumed but remained in some doubt. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 841–43 (2001) (finding uncertainty and arguing against deference to NLRB adjudications). The uncertainty seems to have been resolved in *United States v. Mead*, 121 S. Ct. 2164, 2173–75 (Jun. 18, 2001), which placed formal adjudications, including those by the Board, along with formal rulemaking, among the types of decisions to which *Chevron* deference was required.

tions, new evidence, and changing policy preferences.¹³³ In practice, the Supreme Court seems to accord rather little deference to the Board, and to find any number of reasons to substitute its own reading of the statute.

Sometimes the statutory text seems less plain to the Board than it does to the courts.¹³⁴ The Supreme Court's increasing emphasis on the "plain language" of statutes seems to be associated with an increasing tendency to find answers in that "plain language" and to foreclose deference to the agency. Consider, for example, the long-running saga of the Board's efforts to reconcile the bargaining rights of "professional employees"¹³⁵ with the statutory exclusion of "supervisors," defined since 1947 as those who exercise "independent judgment" in "responsibly . . . direct[ing]" other employees "in the interest of the employer."¹³⁶ Twice the Board put forward a narrow construction of the supervisory exclusion that was aimed at preserving the bargaining rights of registered nurses and other professionals who direct the work of others on the basis of their professional skills but do not exercise other supervisory functions; and twice the Supreme Court rejected that interpretation as inconsistent with the text of the supervisory exclusion.¹³⁷ The Court's readings of the statute were not implausible. But neither were the Board's readings, which had the further virtue of upholding the bargaining rights of employees with very little hierarchical authority within the workplace.¹³⁸ The saga shows how little latitude the Board has in seeking to make a very old statute function in the modern workplace—in this case to accommodate the interests of a growing white collar sector of the workforce.¹³⁹

133. See *Chevron*, 467 U.S. at 863–64.

134. *Chevron* only applies "to agency interpretations of statutes that, applying the 'normal tools of statutory construction,' are ambiguous." Id. at 843 & n.9.

135. 29 U.S.C. § 152(12) (2000).

136. Id. § 152(11). Both the explicit inclusion of professional employees and the exclusion of supervisors originate in the 1947 Taft-Hartley amendments.

137. In *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 573–76 (1994), the Court struck down the Board's holding that the application of professional judgment in the direction of other employees was not judgment exercised "in the interest of the employer" within the meaning of the statute. In *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713–16 (2001), the Court rejected the Board's conclusion that the application of "ordinary professional or technical judgment in directing less-skilled employees to deliver services" was not "independent judgment" within the meaning of the supervisory exclusion.

138. See Brudney, *Reflections*, supra note 37, at 1579 (affirming the plausibility of the board's interpretation).

139. See also *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686–90 (1980) (overruling the Board's certification of a bargaining unit of university faculty members on the ground that the faculty members' limited collective power over academic matters rendered them "managerial employees" excluded from the Act). *Yeshiva* and the two nursing cases together eliminate the protections of the NLRA for many professional employees, as well as for nonprofessional employees who gain significant power over workplace governance through "employee involvement" schemes. Thus, these cases undermine the Board's efforts to make collective bargaining available under circumstances that are increasingly prevalent in the modern economy. See Brudney, *Reflections*, supra note 37, at 1578–80

Even when the language at issue is plainly open to interpretation, the Board's interpretive latitude is limited by the fact that the statutory language has typically been interpreted before. And when the language has been interpreted by the Supreme Court at some point in the past sixty-plus years, that is that; the Board gets no leeway to interpret the law differently in response to changes in the world.¹⁴⁰ Indeed, under standard canons of interpretation, the fact that the precedents at issue are old and theoretically subject to congressional revision amplifies the force of stare decisis.¹⁴¹ The priority of Supreme Court precedent over "*Chevron* deference" to agency interpretations is not unique to the labor law field.¹⁴² The repercussions of the doctrine are magnified in labor law, however, by the length and strength of the congressional impasse over potential statutory reform.

This was brought home in the *Lechmere* decision, which involved a conflict between statutory organizational rights and employer property rights.¹⁴³ In *Lechmere*, the Board had declared that union organizers had a right to distribute union literature in the employer's outdoor parking lot. The Board had applied a balancing test—developed during the 1980s after some seemingly encouraging signs from the Supreme Court—which often yielded a right of access to areas of the employer's property that were open to the public, where the employer's legitimate interest in exclusion was outweighed by the employees' interest in getting information about the union.¹⁴⁴ But the Supreme Court, by a 5-4 vote, rejected

(emphasizing the Court's "genuine reluctance to support group action . . . outside of traditional narrowly defined industrial settings").

140. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992) (stating "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning" (quoting *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990))).

141. See *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

142. See *Neal v. United States*, 516 U.S. 284, 295 (1996) (refusing to defer to agency interpretation in criminal matter where Supreme Court precedent applies); *Maislin Indus., U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) (refusing to defer to agency interpretation in commercial matter where Supreme Court precedent applies). See generally Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 Geo. L.J. 2225 (1997); Rebecca Hanner White, *The Stare Decisis "Exception" to the Chevron Deference Rule*, 44 Fla. L. Rev. 723, 758 (1992) (analyzing broadly the relative weights of agency and Supreme Court statutory interpretation).

143. *Lechmere*, 502 U.S. at 529.

144. The Supreme Court in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 318 (1968), recognized limited free speech rights on private property that, like a shopping mall, was the "functional equivalent" of a town's shopping area, and thus of a classic public forum. A few years later, in *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court effectively overruled *Logan Valley* as a matter of First Amendment law; but at the same time it suggested that access rights might be available under the NLRA. *Id.* at 521-23. The Board responded by developing its balancing test, set forth finally in *Jean Country*, 291 N.L.R.B. 11 (1988). The test most often yielded a right of access to outdoor, nonwork areas of the workplace, such as pedestrian areas of shopping malls. See Robert A.

the Board's resolution of the issue and its balancing test.¹⁴⁵ The Court relied on a 1956 Supreme Court decision striking a different balance and affording access to union organizers only where employees were "beyond the reach of reasonable union efforts to communicate with them."¹⁴⁶ The Court implied that in 1992, as in 1956, this exception applied primarily to employees who live on the employer's property, in logging and mining camps and remote mountain resorts.¹⁴⁷ The Board's supposed expertise added no weight to its conclusion that what was reasonable in 1956—when employees typically lived close to each other and relatively close to the workplace—was not reasonable in the 1980s—when cars were ubiquitous, long commutes common, and communal gathering places rare.¹⁴⁸

Another example of the Board's limited interpretive discretion and flexibility in the face of change is provided by the Supreme Court's 2002 decision in *Hoffman Plastic Compounds v. NLRB*.¹⁴⁹ At issue was the NLRB's capacity to protect organizational rights of undocumented workers, who make up a significant and growing part of the labor force in some industries and regions. The Court had held in 1974 that undocumented workers were "employees" protected by the Act; but questions remained about the Board's remedial powers,¹⁵⁰ and about the significance of intervening immigration legislation.¹⁵¹ In *Hoffman Plastic*, the

Gorman, Union Access to Private Property: A Critical Assessment of *Lechmere, Inc. v. NLRB*, 9 Hofstra Lab. L.J. 1, 7 (1991).

145. *Lechmere*, 502 U.S. at 540–41.

146. *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 113 (1956).

147. *Lechmere*, 502 U.S. at 539–40 (citing and reaffirming *Babcock & Wilcox*, 351 U.S. at 113).

148. See *Lechmere, Inc.*, 295 N.L.R.B. 92, 93–94 (1989), enforced, 914 F.2d 313 (1st Cir. 1990), rev'd, 502 U.S. 527 (1992) (explaining why alternative means of reaching employees—newspaper, radio, and television advertisements, recording license plate numbers of cars in the company lot, and leafleting from a strip of public property adjoining the parking lot—were not feasible or safe). For a few critiques of the Supreme Court's ruling in *Lechmere*, see Brudney, Reflections, *supra* note 37, at 1577–78; Estlund, *supra* note 47, at 325–59; Joan Flynn, The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review, 75 B.U. L. Rev. 387, 439–44 (1995) [hereinafter Flynn, Hiding the Ball]; Gorman, *supra* note 144, at 8.

149. 122 S. Ct. 1275 (Mar. 27, 2002).

150. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1974). In *Sure-Tan*, the Court held that, at least in the case of a worker who had since left the country, the Board's remedial powers were limited: Reinstatement was to be conditioned on proof of lawful reentry, and backpay was not to be awarded for "any period when [the employees] were not lawfully entitled to be present and employed in the United States." *Id.* at 903.

151. The Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2000), prohibited employers from hiring undocumented workers and prohibited workers from falsifying the requisite documentation. Legislative history indicated that the IRCA's employer sanctions were

not intended to limit in any way the scope of the term "employee" in Section 2(3) of the [NLRA], as amended, or of the rights and protections stated in Sections 7 and 8 of that Act. As the Supreme Court observed in *Sure-Tan Inc. v. NLRB*, application of the NLRA "helps to assure that the wages and employment

Board found that the employer had unlawfully fired employee Jose Castro (in 1989)¹⁵² for supporting a union organizing campaign. It later emerged during compliance proceedings that Castro had never been lawfully admitted to the United States. After weighing the precedents and the significance of recent immigration legislation, as well as the policies of the NLRA, the Board concluded that reinstatement was barred but that a backpay award would serve the policies of both the NLRA and the immigration laws by reducing employers' incentive to hire and to exploit undocumented workers.¹⁵³ The Board thus awarded backpay from the date of the unlawful discharge to the date the employer discovered the employee's undocumented status.¹⁵⁴

The Supreme Court reversed in a 5-4 decision. The majority first concluded that no deference was due "to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA," specifically, the immigration laws and their provisions barring the employment of undocumented workers.¹⁵⁵ (Never mind that the Department of Justice, which is charged with enforcing the immigration laws, *agreed* with the Board's order and its consistency with those laws.¹⁵⁶) The majority also chastised the Board for having defied the "plain language" of its 1974 decision limiting the availability of backpay to undocumented aliens.¹⁵⁷ But the case turned ultimately on the perceived conflict between the policies of the NLRA and those of subsequent immigration legislation. The majority proceeded virtually to nullify the former, holding that neither reinstatement nor backpay is a permissible remedy for the anti-union discharge of undocumented workers.¹⁵⁸ With hardly a trace of irony, the Court added, "any 'perceived deficienc[y] in the NLRA's existing remedial arsenal,' must be 'addressed by congressional action,' not the courts."¹⁵⁹

conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment."

H.R. Rep. No. 99-682, Part I, at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662 (internal citation omitted).

152. 122 S. Ct. at 1278. I will return below to the curious fact that more than thirteen years elapsed from the date of the unfair labor practice to the Supreme Court's decision.

153. See 326 N.L.R.B. 1060, 1060-62 (1998).

154. 122 S. Ct. at 1280.

155. *Id.*

156. See *id.* at 1285 (Breyer, J., dissenting). See also Transcript of Oral Arg. at 27-28, Hoffman Plastic Compounds v. NLRB, 122 S. Ct. 1275 (Mar. 27, 2002) (00-1595) (statement of Solicitor General regarding position of Attorney General and Immigration and Naturalization Service).

157. 122 S. Ct. at 1282.

158. *Id.* at 1285. But, the majority noted, "Lack of authority to award backpay does not mean that the employer gets off scot-free," for the Board retained the power to order the employer to "cease and desist" from further unlawful conduct and to post notices of NLRA rights and the employer's wrongs. *Id.*

159. *Id.* (quoting *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 904 (1984)).

Hoffman Plastic teaches some discouraging lessons about the Board's ability to protect labor's associational rights, for it suggests that neither the Board nor those basic rights get much respect. The decision takes an additional bite out of the already diminished ambit within which the Board is accorded deference in its interpretation of the Act. In particular, it targets the Board's ability to vindicate the rights of a vulnerable but growing segment of the labor market, and its ability to reconcile the unchanging but open-textured provisions of the NLRA with the changing shape of less ossified bodies of law.

Even when the Board is operating within the constraints of language and precedent, the courts give the NLRB a rather short leash, one that often strangles innovation. Professor James Brudney has shown that the judicial leash is shortest—at least since the 1960s—when it is the most “collective” of labor’s rights that are at stake.¹⁶⁰ This is evident in the *Lechmere* Court’s skeptical view of the role and the rights of unions in the process of self-organization. The Court drew a novel and questionable distinction between the statutory rights of employees to discuss unionization among themselves, and the merely “derivative” rights of union organizers to communicate with employees.¹⁶¹ So, too, when the Board decided, in the midst of a wave of plant closings and layoffs, that a decision to close part of a business was subject to the employer’s duty to bargain with the union, the Supreme Court in *First National Maintenance*¹⁶² overruled it, finding that management’s interest in quick unilateral action trumped the interest of the union in protecting members’ job security. A more quotidian example of courts’ skepticism toward the most collective of labor’s rights is their frequent rejection of “bargaining orders” that require the employer to bargain with a union whose majority support has been eroded by serious employer misconduct during a representation campaign.¹⁶³

Professor Brudney attributes the courts’ tilt to the NLRA’s age and the increasing incongruity of its New Deal collectivist premises in the contemporary legal landscape.¹⁶⁴ In one sense, the courts’ hostility to the most collectivist dimensions of the labor law might be seen as a form of judicial “updating” of an “aging statute”—as a means of reform in the absence of congressional action. But this updating operates at cross-purposes with the Act itself, and with modest efforts by the Board to make the New Deal statute and its collectivist model of labor relations function in the modern world.¹⁶⁵ Once again, we can observe a change of sorts within labor law, but it is a change that renders the scheme increasingly brittle, outdated, and ineffectual.

160. See Brudney, *Reflections*, *supra* note 37, at 1572–88.

161. See Estlund, *supra* note 47, at 326–30.

162. See *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 686 (1981).

163. Brudney, *Reflections*, *supra* note 37, at 1583.

164. See *id.* at 1584–88.

165. *Id.* at 1588–89.

It is striking to contrast the role courts have played under the NLRA with the creative role they have played—in conjunction with individual and institutional litigants—under the employment discrimination statutes and the common law of wrongful discharge. The lack of a private right of action under the NLRA insulates labor law from that kind of judicial creativity. By contrast, the role that courts do play under the NLRA, through judicial review, is entirely reactive: They may accept or reject the Board's efforts toward innovation, but they do not initiate or encourage innovation.¹⁶⁶ In fact, the courts tend to be not merely reactive but conservative: Board innovation—departure from past Board precedent or practice—tends to trigger heightened judicial skepticism.

Decades of skeptical judicial review have left their mark on the Board's own proceedings. So, for example, the Board has been criticized for proceeding almost entirely through case-by-case adjudication and failing to use its rulemaking powers.¹⁶⁷ In part, this pattern is a response to the Board's experience with hostile judicial review: The use of case-by-case adjudication allows the Board to wrap its policymaking forays in the protective guise of factfinding.¹⁶⁸ The reliance on adjudication creates problems of its own: The enunciation of new rules in the course of an adjudication inevitably raises judicial hackles.¹⁶⁹ Yet Board departures

166. One exception to this proposition may be the Sixth Circuit's short-lived effort to narrow the scope of section 8(a)(2), permitting employer-dominated employee representation committees that were formed without an apparent anti-union purpose and were "freely chosen" by employees. See *Airstream, Inc. v. NLRB*, 877 F.2d 1291, 1296–97 (6th Cir. 1989); *NLRB v. Scott & Fetzer Co.*, 691 F.2d 288, 294 (6th Cir. 1982). The decisions were not reconcilable with the language and Supreme Court precedents discussed above, and seem not to have been followed since the Board reaffirmed the breadth of section 8(a)(2) in its landmark *Electromation* and *E.I. Du Pont* decisions. See supra notes 85–129 and accompanying text.

167. Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 Yale L.J. 729, 730 (1961); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 930 (1965); see *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (criticizing NLRB for promulgating new rules through adjudicatory proceedings); *NLRB v. GranCare Inc.*, 170 F.3d 662, 668–69 (7th Cir. 1999) (quoting *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1466 (7th Cir. 1983)) (arguing that NLRB would be entitled to more deference if it awakened dormant rulemaking powers to particularize application of 2(11) to medical field); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (expressing regret over NLRB's failure to exercise rulemaking power). The Supreme Court has noted and acceded to the Board's preference for adjudication. See *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (noting that adjudication is subject to requirement of reasoned decisionmaking).

168. Flynn, *Hiding the Ball*, supra note 148, at 391–404.

169. Application of the new rule to the case in which it is announced raises problems of retroactive application, which the Court has cautioned ought to be avoided when possible by the use of rulemaking. See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."). The NLRB has been frequently chastised for its lawmaking through adjudication. See *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 388 (D.C. Cir. 1972) ("Despite substantial and

from past practice—even from this much criticized practice of developing doctrine through case-by-case adjudication—also triggers a skeptical response. So when the Board in 1997 issued only the second substantive rulemaking in its history,¹⁷⁰ it was forced to withdraw the proposal under unprecedented pressure from Republicans in Congress. The rulemaking would have modestly strengthened a longstanding presumption in favor of single-facility bargaining units; but employer allies saw it as facilitating union organizing, and imposed appropriations riders barring promulgation of the rule.¹⁷¹

The rulemaking debacle highlights other less visible constraints on the Board's innovative capacities. Congress maintains oversight of the NLRB through appropriations decisions and through confirmation hearings. At times, congressional oversight has been perfunctory, bordering on neglect.¹⁷² But in recent decades, employers' allies in Congress have been quite zealous in their oversight, at least episodically.¹⁷³ Not content to block union-backed labor law reform at the wholesale level, they have been quick to challenge retail-level reforms in Board doctrine and practices. So, for example, former General Counsel Fred Feinstein was repeatedly excoriated by congressional Republicans for his vigorous use of the preliminary injunction in cases of employer discrimination and coercion in representation campaigns.¹⁷⁴ Feinstein recognized that the preliminary injunction is the only effective remedy—because it is the only timely remedy—against aggressive employer interference in union organizing campaigns. But employers realized this as well. Their allies in Congress held up Board appropriations over the issue and refused to

repeated scholarly and judicial criticism, the Board has largely ignored the rulemaking process, and has chosen rather to fashion new standards and to abrogate old ones in the context of case-by-case adjudication."); *Majestic*, 355 F.2d at 860 (Friendly, J.) (expressing regret over NLRB's failure to react to Supreme Court's "hint" in *SEC v. Chery* that NLRB should not engage in rulemaking through adjudication).

170. The first substantive rulemaking proceeding dealt with the appropriate size of bargaining units in the health care industry, and was upheld. Appropriate Bargaining Units in the Health Care Industry, 29 C.F.R. § 103.30 (2000).

171. E.g., Chairman William B. Gould IV, Observations on the Relationship Between Law and Politics as Chairman of the National Labor Relations Board, 1994–1998, Speech Before the California Labor Federation (July 21, 1998), *in* Daily Lab. Rep. (BNA) No. 141, at E-11, E-13 (July 23, 1998) [hereinafter Gould, California Speech]; Daily Lab. Rep. (BNA) No. 209, at B-2 (Oct. 29, 1997). The rulemaking would have basically codified the Board's longstanding presumption in favor of single-facility bargaining units.

172. Brudney, Reflections, *supra* note 37, at 1594.

173. E.g., Gould, California Speech, *supra* note 171, at E-13 (listing numerous examples of intrusive demands and inquiries by members of Congress into particular adjudications, remedies, and other Board proceedings). Chairman Gould's own role in provoking Congressional intrusiveness is suggested in Joan Flynn, "Expertness for What?": The Gould Years at the NLRB and the Irrepressible Myth of the "Independent" Agency, 52 Admin. L. Rev. 465, 491–516 (2000).

174. The events are recounted in Brudney, Reflections, *supra* note 37, at 1593 n.124.

reconfirm Feinstein, all in an effort to rein in the energetic use of existing doctrine and enforcement powers.¹⁷⁵

This episode points to yet another constraint on the Board. The polarized climate that labor law issues lately provoke in Congress has been reflected in increasingly partisan confirmation battles over appointments to the Board.¹⁷⁶ That means that, at any given time over the past few decades, several Board positions were vacant or held by members holding recess appointments and awaiting confirmation, giving Congress unusual leverage over the day-to-day business of the Board. And it is departures from the laconic pace of “business as usual” that trigger scrutiny by congressional partisans.¹⁷⁷ Again, what could be a source of popular input—a release valve for some of the political impulses that are blocked in the legislative process—turns out to play a predominantly obstructionist role.

Some of the impediments to the Board’s effectiveness appear to be of the Board’s own making. Recall, for example, the curious fact that employee Castro was unlawfully fired *thirteen years* before the Supreme Court decided his case in *Hoffman Plastic*, and nine years before the Board issued a remedial order in the case. This is an extreme example of the chronic delays within the Board’s own processes that often render its eventual remedies useless in protecting organizing drives.¹⁷⁸ But even this chronic flaw in the Board’s own processes is related to external constraints on the Board. At least part of the backlog is traceable to Board turnover and vacancies, along with budget cuts and other manifestations of congressional hostility.¹⁷⁹

175. See *id.*

176. See Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 Ohio St. L.J. 1361, 1378–98 (2000) (chronicling increasingly partisan appointments and confirmation battles).

177. See Brudney, *Reflections*, *supra* note 37, at 1593 & n.124.

178. On the chronic delays in Board decisionmaking, see generally John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board’s Response*, 16 Lab. Law. 1 (2000). Courts have repeatedly denied enforcement on grounds of Board delays. See, e.g., *NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 59 (2d Cir. 1999) (Board’s four-and-one-half year delay showed a “cavalier disdain for the hardships it is causing”); *NLRB v. Long Island Coll. Hosp.*, 20 F.3d 76, 77 (2d Cir. 1994) (Board’s “inordinate” thirteen year delay and “procrastination . . . through two or three turnovers of the Board . . . prejudiced everyone”); *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992) (Board’s failure to explain seven year delay qualifies it as the “Rip Van Winkle of administrative agencies”); *Southwest Merch. Corp. v. NLRB*, 943 F.2d 1354, 1358 (D.C. Cir. 1991) (Board’s four-and-one-half year delay “deplorable”); *NLRB v. Mountain Country Food Store, Inc.*, 931 F.2d 21, 23 (8th Cir. 1991) (Board’s unexplained six year delay “inexcusable” and “sloth-like”; rendered enforcement “pointless and obsolete”); *Emhart Indus., Hartford Div. v. NLRB*, 907 F.2d 372, 378–80 (2d Cir. 1990) (Board’s three-and-one-half year delay “inexcusable”). It was these delays that led former General Counsel Feinstein to step up the use of section 10(j) petitions for preliminary injunctive relief.

179. See Truesdale, *supra* note 178, at 4–11.

The Board has also been criticized for its failure adequately to explain its decisions.¹⁸⁰ Courts are often unwilling to presume that “boilerplate” language and conclusory assessments of the totality of the circumstances reflect the Board’s reasoned application of its experience and expertise. On the one hand, judicial resistance to “boilerplate” explanations may be an inevitable response to the Board’s attachment to case-by-case adjudication over rulemaking: Case-by-case adjudication seems to call for case-by-case reasoning and customized remedial responses, whereas routinized, standardized, or categorical treatment would be easier to justify if it were backed by rulemaking and an explicit weighing of experience and evidence regarding the broad run of cases. On the other hand the Board’s longstanding preference for adjudication is fortified by its frustrating experience with more high-profile ventures—witness the fate of the “single location presumption” rulemaking—and by the fear that unsympathetic judicial review of rulemaking would do more damage in a single stroke than the thousand cuts inflicted by the courts’ rejection of particular adjudications.¹⁸¹

In spite of the constraints it faces, the Board has successfully put forward some innovative doctrines aimed at addressing contemporary workplace realities. An example is the Board’s “salting” doctrine, holding that individuals who are employed by a union to organize a workplace, and who seek or gain employment at that workplace, are “employees” protected against employer discrimination in hiring or firing.¹⁸² The Supreme Court’s unanimous approval of the decision in 1995 in *NLRB v. Town & Country Electric, Inc.*,¹⁸³ based largely on the “plain meaning” of the statutory language, sanctioned an alternative avenue of union access to the workplace in the wake of *Lechmere*, and suggests there is still some life, and room for innovation, in those aging provisions.

Another more recent Board decision, widely hailed as an important change in longstanding law, was *Levitz Furniture Co.*,¹⁸⁴ which raised the bar for employers’ withdrawal of recognition from an existing union: A “reasonable doubt” about the union’s majority status is (and has long been) sufficient to justify the employer’s polling of employees, or petitioning for a decertification election; but it is no longer sufficient to jus-

180. See, e.g., *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980) (overturning Board’s “conclusory” holding that faculty members are not “managerial employees”); *Overnite Transp. Co. v. NLRB*, 280 F.3d 417, 436 (4th Cir. 2002) (criticizing Board’s “conclusory” justification for issuing bargaining order instead of ordering new election to remedy employer ULPs); *Be-Lo Stores v. NLRB*, 126 F.3d 268, 282 (4th Cir. 1997) (same); *Henry Bierce Co. v. NLRB*, 23 F.3d 1101, 1110 (6th Cir. 1994) (same).

181. See *supra* note 178.

182. *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 96–98 (1995).

183. *Id.*

184. 333 N.L.R.B. 105 (2001). The decision is cited by one observer as showing that “[d]espite its age, the NLRA continues to be a fertile source of litigation and new thinking.” Steven G. Rush, *Labor-Management Relations and the NLRA*, Bench & B. Minn., Sept. 2001, at 29, 33.

tify the unilateral withdrawal of recognition.¹⁸⁵ For that, the employer must now show that the union has actually lost majority support. The decision makes eminent sense, and puts a much-needed speed bump in the path of employers' deunionization plans. But the fact that this cautious and incremental decision is touted as evidence of the Board's vitality and willingness to innovate speaks volumes about business as usual. The standard deviation must be small indeed if this decision is cause for excitement.

In contemplating the maneuvering room left to the Board, I cannot shake from my mind the image of a car cautiously negotiating the quaintly narrow, cobblestoned streets of an old European town. Slight deviations in either direction may cause a noisy collision. But the resulting commotion cannot obscure the fact that travel is slow, bumpy, and narrowly confined by the rigid medieval walls on either side.

III. OSSIFICATION FROM WITHOUT: OBSTACLES TO CHANGE FROM OUTSIDE THE NLRA

So we find that the basic federal scheme of labor relations contains some built-in obstacles to innovation, and that this scheme, including the obstacles to change, has become entrenched at least since the 1950s by a political logjam in Congress. But our system of government distributes and diffuses power and the potential to bring about legal change both to other subordinate sovereigns through principles of federalism and to other branches of government through constitutionalism and the separation of powers. Moreover, domestic law is theoretically subordinate to the commands of international law. Yet there has been little or no innovation from these quarters either. The NLRA's scheme of labor relations has been rendered largely impervious to change at the margins by state and local lawmaking, and to challenges from "above"—from constitutional and international law.

A. *The Preemption of State and Local Labor Law*

Labor law reform may be a nonstarter in Congress. But what about adaptations at the state and local level? In a federal system, state-by-state variations might ordinarily be expected, and might permit a kind of experimentation around the edges of the national scheme. Successful "experiments" might have spread to other localities, and might even have provided credible models for national reform.¹⁸⁶ State and local lawmak-

185. Observers of the prior "reasonable doubt" regime may see little change; employers' doubts were rarely deemed reasonable in the context of a unilateral withdrawal of recognition. See Flynn, *Hiding the Ball*, *supra* note 148, at 394–95.

186. The potential role of state and local experimentation and variation has long been understood as one virtue of a federal system. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the

ing might also have given voice to popular discontent with the existing labor law regime that has no effective outlet at the federal level; it might have made room at the local level for democratic reform efforts that are stymied in Congress.¹⁸⁷

We can glimpse some of the variation and innovation that might have emerged from the states by looking at the collective bargaining laws that many states have enacted for those employers over whom they do have jurisdiction—most importantly, state and local governmental employers.¹⁸⁸ Those laws are especially interesting in that they were designed to deal with an overwhelmingly white collar workforce—one that more closely resembles today's private sector workforce than does the predominantly blue collar workforce of the 1930s. Moreover, since those laws typically either prohibit or restrict strikes by public employees, they have devised alternative, less confrontational means of resolving collective bargaining disputes, such as binding “interest arbitration.”¹⁸⁹ The strike weapon, which still stands at the center of the NLRA scheme, has been rendered nearly worthless in many circumstances by employers' willingness and ability to permanently replace strikers, and is in any event one of the least appealing dimensions of the collective bargaining process for many non-union workers. Even assuming that the strike must remain available for private sector workers, there is no doubt that those workers are in need of alternate means of pressing their economic demands.¹⁹⁰

rest of the country.”). See generally Richard H. Fallon, Jr., The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions, 69 U. Chi. L. Rev. 429, 440–41 (2002) (arguing that federalism encourages local participation, competition, and checks national power); Michael W. McConnell, Federalism: Evaluating the Founders’ Design, 54 U. Chi. L. Rev. 1484, 1498 (1987) (arguing that federalism creates competition, which in turn fosters innovation in governmental function). Professors Dorf and Sabel stake out a dramatically expanded and reconstructed role for state and local experimentation within what they call a “constitution of democratic experimentalism.” See Dorf & Sabel, *supra* note 4, at 419–38. I have in mind here only the more conventional notion of state and local experimentation within a federal system.

187. Professor Michael Gottesman has linked the importance of preemption doctrine to the problem of congressional paralysis. See Gottesman, Preemption, *supra* note 108, at 360–61.

188. Governmental employers are excluded from the Act. 29 U.S.C. § 152(2).

189. “Interest arbitration” allows a third party not to resolve disputes under an existing agreement, like ordinary arbitration, but to decide the terms of the agreement, based on the relative reasonableness of each side’s proposals.

190. Some advocates of private sector labor law reform call for interest arbitration of first contracts, in light of the weakness of new unions and the frequency with which they fail to negotiate a first contract in the face of continuing employer resistance. William Gould thus suggests that the use of interest arbitration in the public sector might “have substantial impact on the private sector.” William B. Gould IV, *A Primer on American Labor Law* 214 (3d ed. 1993). See also Robert G. Howlett, Interest Arbitration in the Public Sector, 60 Chi.-Kent L. Rev. 815, 836–37 (1984) (arguing that public sector experience argues for use of interest arbitration rather than “trial by combat” in all labor disputes). For other arguments in favor of interest arbitration in the private sector, see Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 Ind. L.J. 103, 126 (2001); Paul Weiler, *Striking a New Balance: Freedom of Contract*

But even incremental state and local reform efforts run headlong into the wall of federal labor law preemption.¹⁹¹ The NLRA contains no express preemption provision.¹⁹² But the constitutional supremacy of federal law dictates the preemption of state law that is in “conflict” with federal law. The question is how broadly federal law is deemed to extend, so as to conflict with state law. At a minimum, for example, state law may not prohibit that which is protected by the Act or require that which is prohibited. So the states may not ban union membership or federally protected labor picketing; nor may the states require employers to create employee representation committees that would violate section 8(a)(2) of the Act.¹⁹³ Such state laws would be “repugnant” to the express provisions of federal law.¹⁹⁴ That was roughly the shape of federal preemption of state labor law until the 1950s.

After the Taft-Hartley Act extended the reach of federal regulation to union as well as employer conduct, however, Congress came to be seen as having implicitly preempted a much broader range of state laws. Modern labor law preemption essentially ousts states and municipalities from tinkering with the machinery of union organizing, collective bargaining, and labor-management conflict.¹⁹⁵ Under what is known as “*Garmon* pre-

and the Prospects for Union Representation, 98 Harv. L. Rev. 351, 405–12 (1984); cf. Theodore J. St. Antoine, Federal Regulation of the Workplace in the Next Half Century, 61 Chi.-Kent L. Rev. 631, 652–53 (1985) (suggesting that compulsory arbitration become mandatory to compensate for decline in union negotiating strength due to infrequent use of strikes). But see Samuel Estricher, The Dunlop Report and the Future of Labor Law Reform, 12 Lab. Law. 117, 128 (1996) (criticizing idea of importing interest arbitration into private sector).

191. For critical views of preemption, see Gottesman, Preemption, *supra* note 108, at 391; Eileen Silverstein, Against Preemption in Labor Law, 24 Conn. L. Rev. 1, 11 (1991). For the more conventional view among labor law scholars favoring broad federal preemption, see, e.g., Archibald Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1339 (1972); Archibald Cox & Marshall J. Seidman, Federalism and Labor Relations, 64 Harv. L. Rev. 211, 245 (1950); William B. Gould, The Garmon Case: Decline and Threshold of “Litigating Elucidation,” 39 U. Det. L. Rev. 539, 540–41 (1962) [hereinafter Gould, *Garmon*]; David L. Gregory, The Labor Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?, 27 Wm. & Mary L. Rev. 507, 509 (1986); Bernard D. Meltzer, The Supreme Court, Congress, and State Jurisdiction over Labor Relations: II, 59 Colum. L. Rev. 269, 302 (1959).

192. Indeed, section 10(a) of the Act provides that the Board’s power to prevent unfair labor practices “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.” 29 U.S.C. § 160(a) (2000). In the years before the consolidation of the broad preemption doctrine that prevails today, this provision was thought to refute the claim that Congress intended the Board’s jurisdiction to be exclusive. See Gottesman, Preemption, *supra* note 108, at 386–87.

193. Yet some states may have done just that in mandating workplace safety committees. See *infra* note 205 and accompanying text.

194. See *Hill v. Florida*, 325 U.S. 538, 548 (1945).

195. For an exceptionally lucid account of how preemption doctrine grew to its current outsized dimensions, see Gottesman, Preemption, *supra* note 108, at 383–91.

emption,”¹⁹⁶ by and large, a state may not regulate activity that is arguably protected¹⁹⁷ or arguably prohibited¹⁹⁸ by the Act.¹⁹⁹ And under what is known as “*Machinists* preemption,”²⁰⁰ states and municipalities may not weigh in on one side or the other of labor disputes by regulating activity that is clearly *unregulated* by the Act—that is clearly neither protected nor prohibited. *Garmon* and *Machinists* together virtually banish states and localities from the field of labor relations.

Under that broad preemption doctrine, for example, states may not award additional remedies for conduct the Act prohibits; nor may they impose additional punishment on labor law violators, or even disfavor them in the award of state contracts.²⁰¹ States may not, therefore, extend a private right of action, with make-whole remedies, to an employee fired for seeking union representation.²⁰² That tort remedy would fit comfort-

196. San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236 (1959). *Garmon* preemption is founded on the “primary jurisdiction” of the NLRB to define the scope of protected and prohibited conduct under the Act. A convoluted but important exception to *Garmon* was carved out to allow a trespass prosecution against picketing in *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 198 (1978) (holding that a state may exercise jurisdiction over the trespassory aspects of union activity, as the reasons for preemption of state jurisdiction over union activity that is arguably prohibited by the NLRA do not apply in this case).

197. Regulation of “arguably protected” conduct is preempted unless the argument for protection is weak and the protected party (the union) could have asserted the claim in a ULP charge but has failed to do so, leaving the employer with no forum in which to refute the claim of protection. See *Sears*, 436 U.S. at 211–12.

198. Regulation of “arguably prohibited” conduct is preempted unless the basis for federal prohibition—e.g., the prohibited purpose of a picket—is completely distinct from the basis for state prosecution—e.g., the location of the picketing, in the case of a trespass prosecution. See *id.* at 198.

199. For an argument against *Garmon* preemption, see Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 Fordham L. Rev. 469, 564–71 (1993). Professor Gottesman argues for a partial retreat from *Garmon*. See Gottesman, *Preemption*, *supra* note 108, at 359–61.

200. *Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976).

201. *Wis. Dep't of Indus., Labor & Human Relations v. Gould*, 475 U.S. 282, 283–89 (1986) (citing *Garmon*, 359 U.S. at 236). State entities may, however, impose labor-related conditions on contractors for public projects if they are acting as “proprietors” rather than as regulators, and can link the conditions to a legitimate need to avoid disruptive labor disputes. See *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 229–32 (1993) (*Boston Harbor*).

202. Gottesman recognizes that “[t]his suit unquestionably would be preempted under traditional *Garmon* analysis.” Gottesman, *Preemption*, *supra* note 108, at 395. See, e.g., *Satterfield v. W. Elec. Co.*, 758 F.2d 1252, 1252–53 (8th Cir. 1985) (preempting employee’s suit alleging discharge for distributing right to work literature because conduct was arguably protected by Act); cf. *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 460 U.S. 669, 683–84 (1983) (preempting suit by supervisor alleging union interference in employment contract); *Local No. 207, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Union v. Perko*, 373 U.S. 701, 702–08 (1963) (same). Gottesman argues that a better analysis—one consistent with the Supreme Court’s holdings but not with its

ably within the contours of the tort of wrongful discharge in violation of public policy.²⁰³ Yet labor law preemption doctrine prevents the states from enforcing their own public policy against anti-union discrimination, even in a manner consistent with federal law; affording remedies beyond what the Act prescribes is deemed to “conflict” with the federal scheme of limited remedies.²⁰⁴

There are exceptions to labor law preemption. States are free, when acting in their “proprietary” capacity, to make contracts favorable to organized labor, and to avoid the costs associated with labor unrest, on public projects.²⁰⁵ But they may not use their market power to effectively “regulate” labor relations, for example, by linking general state procurement policies to the labor relations practices of contracting firms.²⁰⁶ More importantly, states are largely free to enforce general laws against

doctrine—would not call for preemption here. See *infra* notes 225–228 and accompanying text.

203. That tort remedy resembles one of the classic “public policy” decisions upholding the wrongful discharge claim of an employee fired for filing a workers’ compensation claim. *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425, 428 (Ind. 1973). For evidence that many states would deem anti-union discharges contrary to public policy and tortious, see Gottesman, *Preemption*, *supra* note 108, at 369 n.59.

204. See *Garmon*, 359 U.S. at 247; *Gould*, *Garmon*, *supra* note 191, at 542–45. I do not wish to overstate the breadth of preemption doctrine. Professor Matthew Finkin has argued, for example, that states are free under existing preemption doctrine to require employers to institute employee committees to deal with safety and other workplace issues, so long as the committees operated within the confines of section 8(a)(2). See Matthew W. Finkin, *Employee Representation Outside the Labor Act: Thoughts on Arbitral Participation, Group Arbitration, and Workplace Committees*, 4 U. Pa. J. Lab. & Emp. L. (forthcoming, 2002) [hereinafter Finkin, *Arbitral Participation*]. That would be an important avenue of potential change in labor relations, and an important potential role for union representation of employee interests. I will return to this question below in connection with section 8(a)(2). For now, suffice it to say that it seems unlikely that these committees could function without a degree of employer “support” and “interference” that would render them prohibited under the Act; indeed, the laws may effectively require such “support.” Requiring conduct that is at least arguably prohibited by the Act falls squarely within the conventional scope of *Garmon* preemption. On the other hand, a preemption challenge to state laws of this kind would be an appealing context within which to revisit the scope of preemption doctrine.

205. See *Bldg. & Constr. Trades Council*, 507 U.S. at 227–32; see also *Colfax Corp. v. Ill. State Toll Highway Auth.*, 79 F.3d 631, 633–35 (7th Cir. 1996) (rejecting preemption challenge to bid specification requiring contractors on a public project to enter collective bargaining agreements); *Hotel Employees Local 2 v. Marriott Corp.*, No. C-89-2707 MHP, 1993 WL 341286, at *5–*9 (N.D. Cal. Aug. 23, 1993) (applying *Boston Harbor* and distinguishing *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*) in upholding agreement for neutrality and card check recognition; public agency was permitted to demand conditions conducive to labor peace with regard to hotel to be built on public property).

206. See *Gould*, 475 U.S. at 282. On analogous reasoning, the D.C. Circuit struck down an executive order authorizing the prohibition of federal government procurement from firms that permanently replace strikers. *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), reh’g denied, 83 F.3d 439 (D.C. Cir. 1996). The court held that the government was not acting in its “proprietary” capacity but was effectively regulating labor relations in a broad segment of the private economy, and that this regulation conflicted

violence, intimidation, and trespass in the context of labor disputes, though they may not otherwise regulate collective bargaining, industrial conflict, or labor organizing.²⁰⁷ The net effect of these exceptions is to skew an apparently “neutral” preemption doctrine in favor of employers. For, outside the limited context of public projects, states’ role in the labor relations sphere is largely confined to protecting property and public order. Employers have the property that is thus protected, while organized labor traditionally relies on the power of numbers and of more or less disruptive concerted activities such as picketing. So when states and localities do permissibly intervene in private sector labor disputes, they usually do so against union activity.²⁰⁸

The fact remains that labor law preemption is exceptionally broad.²⁰⁹ This broad preemption doctrine rests on Congress’ presumed intent, as discerned by the Supreme Court. It might arguably be categorized as one of the “built-in” obstacles to change and variation—one that was built in with the Taft-Hartley Act. However, Professor Gottesman has shown that preemption doctrine came untethered from its statutory moorings and outgrew its justification during the 1950s, and that the far reaches of preemption doctrine are neither clearly implied nor clearly consistent with either national labor policy or principles of federalism.²¹⁰ Apart from some later concessions to states’ power to protect personal and property rights against union activity, preemption doctrine has become nearly as entrenched as the text itself.²¹¹

with the “right” to permanently replace strikers that it deemed to have been established by the combination of *Mackay* and *Machinists*. *Id.* at 1332–39.

207. The states are permitted to reach labor activity incidentally in enforcing general state laws that protect compelling local interests; for example, they may punish violence (*UAW-CIO v. Russell*, 356 U.S. 684 (1958)), or threats of violence (*United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954)), or, in most cases, trespass (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978)). They may impose tort liability for intentional infliction of emotional distress (*Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977)) or, subject to certain limitations, defamation (*Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966)). But they may not target labor relations or punish protected activity under the guise of these laws.

208. Indeed, the development of these exceptions to *Garmon* since the 1950s illustrates one way in which labor law has not become ossified so much as it has *changed* in an anti-labor direction. See Julius G. Getman & F. Ray Marshall, *The Continuing Assault on the Right to Strike*, 79 Tex. L. Rev. 703, 719–22 (2001); Silverstein, *supra* note 191, at 12–43. But the template for these exceptions was largely in place before 1960. The expansion in state authority that has come about since then is not insignificant, but it is less significant than the blockage of state and local variation and experimentation that follows from the main current of preemption.

209. For a review of the comparatively accommodating approach to state law in other areas of employment law, see Silverstein, *supra* note 191, at 34–43.

210. See Gottesman, *Preemption*, *supra* note 108, at 384–94.

211. The strength and breadth of implied labor law preemption seems out of step with the powerful tide of recent federalism decisions. Those decisions have limited Congress’s power to regulate in a variety of areas, including state employment. See *infra* notes 266–268 and accompanying text. Yet labor law preemption doctrine reads into

Machinists preemption, which bars state regulation of “economic weapons” left unregulated by the NLRA, has proven to be an especially potent weapon against local pro-labor politicking. The idea behind *Machinists* preemption is that Congress’s failure to regulate certain conduct represents a deliberate decision to leave that conduct entirely unregulated, and to clear the decks for “free play of economic forces” among the parties to labor disputes.²¹² *Machinists* itself struck down a state injunction against a concerted “slowdown” by workers—an economic weapon short of a full strike that is neither prohibited by the Act nor protected against employer reprisals.²¹³ The Court in *Machinists* reasoned that an employer that was too weak to resist such self-help tactics on its own should not be able to resort to state assistance in its economic contest with the union.

At least in the last decade or two, however, *Machinists* preemption has usually been wielded against pro-labor interventions by states and localities. States have been preempted from banning or penalizing the use of permanent striker replacements—an employer tactic that is neither protected nor prohibited by the Act.²¹⁴ The doctrine has been held to invalidate a state law limiting the enforcement of trespass laws in labor disputes.²¹⁵ And it has been used to strike down local measures that condition an employer’s operations on the settlement of a labor dispute.²¹⁶

Indeed, not only does federal law preempt most local interventions into labor-management relations, but it also provides a damages remedy to employers who are the target of preempted local action. In a pair of cases, the Supreme Court held, first, that the City of Los Angeles was

congressional silence (of which there has been a great deal here) a broad ouster of state and local lawmaking in the area of private sector labor relations. I will return below to the question of whether the federalism decisions might point the way to a narrower preemption doctrine.

212. *Lodge 76, Int’l Ass’n of Machinists v. Wis. Employment Relations Comm’n*, 427 U.S. 132, 140 (1976) (outlining preemption of state law where “Congress intended that the conduct involved be unregulated because left ‘to be controlled by the free play of economic forces’” (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971))).

213. *Id.* at 154–55.

214. A Minnesota statute prohibiting permanent replacement of striking or locked-out employees was held preempted by the Minnesota Supreme Court in *Midwest Motor Express, Inc. v. Int’l Bhd. of Teamsters, Local 120*, 512 N.W.2d 881, 883 (Minn. 1994), and by the Eighth Circuit in *Employers Ass’n v. United Steelworkers*, 32 F.3d 1297, 1301 (8th Cir. 1994). To the same effect, see *Greater Boston Chamber of Commerce v. City of Boston*, 778 F. Supp. 95, 98 (D. Mass. 1991) (striking down Boston ordinance banning permanent replacements where they might pose threat to public safety) and Opinion of the Justices of the Supreme Judicial Court, 571 A.2d 805, 810 (Me. 1989) (concluding that statute to delay hiring of permanent replacements would be preempted if enacted).

215. See *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 363–66 (4th Cir. 1991). For a persuasive argument that a sensible preemption doctrine would not bar laws that limit the scope of trespass laws, and thus expand union access to employer property, see Gottesman, *Preemption*, *supra* note 108, at 411–18.

216. See *Golden State Transit Corp. v. City of Los Angeles (Golden State I)*, 475 U.S. 608, 615–18 (1986).

preempted from conditioning the renewal of a taxicab franchise on the settlement of a pending labor dispute between the cab company and its union (*Golden State I*);²¹⁷ and, in a second round, that the City was liable for compensatory damages under section 1983 for the violation of the cab company's federal rights (*Golden State II*).²¹⁸

In effect, preemption doctrine has done what Congress did not do in the NLRA, or even with the Taft-Hartley Act: It has granted to employers a federal "right" to use their economic power against unions.²¹⁹ Employers do have rights and corresponding remedies against union conduct that is expressly prohibited by the Act.²²⁰ But the NLRA contains no explicit employer analogue to the section 7 rights of employees—no explicitly "protected" conduct, and no residual "right" to wield their economic power against labor. Those employer rights derive from state law; as such, they would normally be both limited by the federal rights of employees *and* subject to modification by the state itself. But under *Machinists*, employers enjoy a federal right to engage in self-help—within the wide boundaries set by the NLRA—unimpeded by state and local action. *Machinists* preemption essentially transforms management's economic power, and some of its rights under the state law of property and contract, into federal statutory rights.²²¹ And under *Golden State II*, those employer rights, *unlike the employee rights that are explicitly protected by the Act*, are backed by a private action for damages.²²² And all of this is implied from congressional silence.²²³ One might see this very development as

217. *Id.*

218. *Golden State Transit Corp. v. City of Los Angeles (Golden State II)*, 493 U.S. 103, 108–13 (1989).

219. *Garmon* preemption has a similarly curious effect: By preempting states from adding penalties or remedies for anti-union conduct that is prohibited by the Act, it effectively grants employers partial federal "protection" of their prohibited anti-union conduct. They are "protected" by federal law against make-whole remedies or punitive sanctions for conduct that is clearly contrary to federal law. The irony of some of these applications of preemption doctrine, and a different view of that doctrine, is explored in Gottesman, *Preemption*, *supra* note 108.

220. For example, against secondary boycott activity prohibited by section 8(b)(4), 29 U.S.C. § 158(b)(4)(ii)(B) (2000), and certain recognitional picketing under section 8(b)(7), 29 U.S.C. § 158(b)(7). Indeed, the law expressly affords employers a private right of action against illegal secondary activity. *Id.* § 187.

221. This was made explicit when the D.C. Circuit struck down President Clinton's executive order barring the federal government's procurement of goods and services from firms that permanently replaced strikers. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1334 (D.C. Cir. 1996), reh'g denied, 83 F.3d 439 (D.C. Cir. 1996). *Reich* was not an ordinary preemption case, as it dealt with federal executive action. But it cited *Machinists* for the proposition that the order violated employers' "NLRA right to hire permanent replacements." *Id.* at 1330, 1334–38.

222. *Golden State II*, 493 U.S. at 109.

223. Of course, if state and local governments were to intervene against unions or employees in violation of these preemption doctrines, the union or employees would have a damages action, too. But the impact of preemption doctrine on labor and management is not quite symmetrical, as we will see below.

itself a kind of “innovation” in the labor law. But it is an innovation that aims to stop innovation—to deter states and localities from weighing into labor disputes and tinkering with the rules of engagement that Congress has established and that the Supreme Court has elaborated between labor and management.

It is hard to say for sure whether labor or management would have gained more from a narrower preemption doctrine, because it is hard to say how state and local governments would have exercised their broader authority over labor relations. We can safely guess that organized labor would have gained legal leverage in those states and localities in which it is strongest politically—especially the industrialized areas of the Midwest, Northeast, and West Coast—and lost it in those states in which organized labor is relatively weak—especially the South.²²⁴

That may look like a draw (or worse, given labor’s waning strength). But it is not. That is because labor’s basic rights are explicitly protected in the NLRA itself, and would thus be protected from infringement by even a narrow preemption doctrine—one that hewed more closely to the minimum demands of the Supremacy Clause. Management’s most important “rights,” by contrast, are not found in the Act but in state law itself. Some of those rights are elevated to federal stature by the outer reaches of preemption doctrine, by implication from the law’s silence. But a narrower preemption doctrine would put them back in their proper place in state law. A narrower preemption doctrine would thus predictably afford more room for the regulation of employer conduct than for the regulation of employee and union conduct.

Consider, for example, Professor Gottesman’s proposed reconstruction of preemption doctrine.²²⁵ He observes that some of the NLRA’s prohibitions are carved out of a larger “continuum” of conduct that is otherwise protected by the Act. For example, peaceful picketing in support of union aims is protected by section 7 unless it is prohibited by section 8(b).²²⁶ As such, additional punishment of “prohibited” picketing would risk trenching on protected conduct and should be preempted.²²⁷ But not all conduct regulated by the Act is part of such a

224. It is noteworthy that the one statutory concession to regional variation is the Act’s express immunization of state “right-to-work” laws—laws that prohibit collective bargaining provisions requiring employees to join unions—that are widespread in the South. See 29 U.S.C. § 164(b).

225. Gottesman, *Preemption*, *supra* note 108, at 358–61.

226. That is, it is “concerted activit[y] for . . . mutual aid or protection,” protected under section 7, unless it is secondary activity prohibited under section 8(b)(4) or recognitional activity prohibited under section 8(b)(7). *Id.* at 376.

227. Gottesman writes:

Congress has drawn a line, and federal interests exist on either side of it. Protecting picketing up to the line serves the federal interest in enhancing employee bargaining power. Prohibiting picketing beyond that line serves the federal interest in insulating neutral parties from economic overkill. . . . To allow states to regulate the portion they think federal law prohibits is to risk that states

“continuum.” For example, a state law granting union organizers greater access to the workplace than they enjoy under the Act does not risk infringing on federal interests, for there is no federal interest in allowing employers to exclude union organizers from their property.²²⁸ Because federal law expressly protects most of the concerted employee conduct that is not expressly prohibited by the Act (but does not do the same with respect to employer conduct), this narrowing of preemption doctrine has a predictable tilt.

Another way of rethinking the scope of labor law preemption would require us to distinguish between the Act’s basic rights of self-organization and its rules of engagement for the organized workplace. As to the latter, it can perhaps be said that Congress has struck a balance, choosing to permit some tactics and to prohibit others by both parties in the economic contests between them. But as to the former—in particular the rights of unorganized employees to discuss workplace issues and the merits of unionization, free from retaliation—the metaphor of a “fair contest” or a battle, with carefully calibrated rules of engagement, is utterly out of place.²²⁹ The basic rights of unorganized workers and the remedies established by the Act could be conceived of as minimum standards, which states may supplement so long as they do not come into direct conflict with the federal scheme or with the Constitution. States could, for example, create broader rights of access to the workplace for organizers and stronger remedies and penalties for the discharge of union activists. That approach would place the basic federal associational rights of workers on much the same footing, vis-à-vis state lawmaking, as the federal antidiscrimination rights of workers: States would be free to add to the protections of federal law, even though doing so would necessarily

will mistake the dividing line by prohibiting conduct that in fact is federally protected.

Id. at 357.

228. Gottesman explains:

Congress imposed its will in derogation of state notions of property to the extent it thought federal interests warranted—here, the interest in facilitating employee self-organization. But it did not otherwise intend to disturb the states’ existing authority to define property interests. Under this view, Congress’ failure to create a more general right of entry signifies not that states may not allow such entry, but rather that the choice whether to allow such entry remains where it was before the federal enactment, with the states.

Id. at 358–59. Professor Gottesman acknowledges that his proposal would require a significant revision of existing preemption doctrine. But he argues convincingly that the proposal respects the *results* of the Supreme Court’s preemption decisions (most of which involved “continuum” conduct), and would better reflect both national labor policy and principles of federalism. *Id.* at 383–94.

229. Similarly, the political metaphor for union representation campaigns, and the corresponding treatment of employers as the equivalent of competing “candidates” with the right to campaign against unionization, is deeply misguided, as Craig Becker has persuasively argued. See Becker, *supra* note 38, at 535–47. What it misses, and what my proposed distinction seeks to capture, is the overweening power that employers have over the unorganized individual employee.

strike a different “balance” and increase the burdens on employers. In other words, federal law would place a floor but not a ceiling on the basic “civil rights” of employees to associate and organize themselves.²³⁰

Under the broader preemption doctrine that we have instead, there is no room for these variations. That means that states have lost some of the flexibility they might have had, consistent with federal law, to implement their own policies. It means that the popular impulses that are stymied at the federal level have no outlet at the state and local level either. And it means that whatever lessons might have been learned from state-by-state experimentation with the intermediate level principles of labor relations have gone unlearned.

B. *The Deconstitutionalization of Labor Law*

That brings us to the last two blocked avenues of potential labor law reform, which come not from within the statutory scheme but from “above”: The federal Constitution and international law both embody evolving fundamental norms of civil and human rights that might have cast a critical light on, or even supported a legal challenge to, aspects of American labor law. But that has not happened.

Before 1937, labor law had everything to do with the Constitution. The laissez faire construct of “liberty of contract” posited a right to sell one’s labor, and to buy the labor of others, on such terms as the market permitted, free from interference by the state (or, for that matter, by organized labor). Minimum wage and maximum hours laws, laws legitimizing organized labor activity, even laws prohibiting the discharge of union members were struck down by federal courts as unlawful interference with the right of employers *and of workers* to buy and sell labor on such terms as they saw fit.²³¹ This was the unique American version of constitutional labor rights: The right to be free from the shackles of protective labor legislation.

230. I do not offer this as a full-blown proposal; this brief sketch leaves many questions unanswered. For example, how would we define the ambit of “basic rights” of unorganized employees? Would it include the rules governing union representation proceedings? Could states mandate card-check recognition? For another example, at what point would employees be deemed “organized” so as to become subject to exclusively federal jurisdiction? When they have been recognized by the employer? When they have a first contract? Might a group of employees with no formally recognized union exercise enough collective power that they must forfeit the potentially more generous protections of state law in favor of the federal rules of engagement? Could states change the rules governing strikes by unorganized employees? These are questions for another day.

231. In addition to *Lochner v. New York*, 198 U.S. 45 (1905), see, e.g., *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525 (1923) (invalidating minimum wage law); *Truax v. Corrigan*, 257 U.S. 312 (1921) (invalidating a law restricting use of injunctions in labor disputes); *Adair v. United States*, 208 U.S. 161 (1908) (invalidating a law banning discharge of union activists and “yellow dog contracts” not to join a union).

But since the NLRA's constitutional vindication helped to close the door on the era of "substantive due process,"²³² the courts have had almost no resort to the Constitution as a source of critical scrutiny of the federal labor law regime.²³³ In particular, the Constitution has played virtually no role in expanding the statute's protection, or in challenging its suppression, of collective action and expression by employees.²³⁴ It is not for lack of textual material. The labor movement long harkened back to the Thirteenth Amendment's ban on involuntary servitude as a foundation for the rights to strike and to act in concert.²³⁵ So, too, in the magisterial language of the Fourteenth Amendment—in the Equal Protection Clause or the Privileges and Immunities Clause—or in the First Amendment, with its freedoms of expression, association, and assembly, one might have found room for the development of workplace rights.²³⁶

Of course, these constitutional rights mostly operate against state action, not against employer interference. The Constitution does not normally come into play in the mere enforcement of private property and contract rights, and rarely gives any positive entitlement to government protection from private oppression.²³⁷ The major exception is the Thirteenth Amendment; but that has long been construed to assure individuals' ability to quit employment, and not, as organized labor would have it, to guarantee employees' freedom from "wage slavery" and their rights of

232. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33–34 (1937) (affirming Congress's power to protect workers' right to organize as not inconsistent with any right of employers).

233. With the exception of the *DeBartolo* and *Tree Fruits* decisions, see infra notes 249, 332 and accompanying text, the few constitutional challenges that have made any mark on the NLRA have been decided against labor unions. See *BE & K Constr. Co. v. NLRB*, 122 S. Ct. 2390, 2392 (June 24, 2002) (rejecting Board's interpretation of section 8(a)(1) as prohibiting employer from filing a "reasonably based but unsuccessful lawsuit" against a union based on retaliatory motives; the Board's interpretation would raise serious First Amendment concerns); *Communications Workers of Am. v. Beck*, 487 U.S. 735, 742–44 (1988) (discussed infra text accompanying notes 261–262); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (construing Act to exclude coverage of teachers at church-operated schools to avoid First Amendment concerns); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203–04 (1944) (construing Railway Labor Act, and by necessary implication NLRA, to require unions' fair representation without discrimination on the basis of race to avoid a serious equal protection challenge to statute's grant of exclusive representation); *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469 (1941) (holding that NLRB decisions restricting employers' anti-union campaigning violate First Amendment).

234. For the small role it has played, see infra note 246 and accompanying text.

235. See Pope, *Shaping*, supra note 25, at 15–21.

236. See William Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 Wis. L. Rev. 767, 797–801; Pope, *Right to Organize*, supra note 72, at 934–49; James Gray Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 Hastings Const. L.Q. 189, 197–98 (1984) [hereinafter Pope, *Ladder*].

237. But cf. *Shelley v. Kramer*, 334 U.S. 1, 14–18 (1948) (striking down on equal protection grounds a state court's enforcement of a private racially restrictive covenant).

association and collective self-help.²³⁸ With the Thirteenth Amendment relegated to the periphery of the modern economy, the state action requirement largely neutralizes the federal Constitution as a source of employee rights in the private sector. But that is not the whole story, for even where the NLRA itself regulates employee expression—as with the prohibition of peaceful picketing of neutral employers, for example—the Supreme Court’s Constitution has had almost nothing to say about it.²³⁹

The conventional understanding of this constitutional silence points to the “switch in time” in 1937 from the highly intrusive judicial scrutiny of economic, and especially labor, legislation to a new era of deference to the legislature, and especially to Congress, in economic matters.²⁴⁰ The conventional story might be encapsulated as “live by the sword, die by the sword.” The basic rights of American workers were won in a battle for legislative supremacy against the courts and their constitutional power of judicial review. When the political winds shifted against unions, deference to the “delicate balance struck by Congress” prevailed. It prevailed even when Congress passed laws abridging the freedom of speech of unions and employees, as it did with the Taft-Hartley restrictions on peaceful secondary picketing.²⁴¹

But the conventional story is too simple. It is too simple, first, because the Supreme Court in 1937 did not simply give up its extraordinary power of judicial review in favor of judicial deference; it redirected its scrutiny away from the economic sphere toward political and civil rights. The Supreme Court’s new constitutional project, haltingly undertaken at times, was to safeguard individual liberties of free expression and association, especially as they contributed to democratic politics, and to protect “discrete and insular minorities” and groups whose access to the political process was impaired.²⁴² Initially there was some ambivalence about

238. The saga of labor’s losing battle for a broad view of the Thirteenth Amendment is well chronicled in Pope, *Shaping*, supra note 25. See also Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 Duke L.J. 1609, 1668–80 (2001) (describing the ill-fated efforts of Department of Justice to use Thirteenth Amendment to create a framework for labor-infused civil rights).

239. Sections 8(b)(7) and 8(b)(4) regulate peaceful recognitionnal picketing and secondary picketing respectively. See 29 U.S.C. §§ 158(b)(7), 158(b)(4) (2000). They were upheld in *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980) (upholding ban on peaceful secondary consumer picketing); *Int’l Bd. of Elec. Workers v. NLRB*, 341 U.S. 694 (1951) (upholding ban on secondary labor picketing). “Almost nothing” is not nothing. The Court has recognized, and avoided by a strained construction of the Act, a potential conflict between the First Amendment and a statutory ban on distributing leaflets about a pending labor dispute to consumers.

240. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage law and proclaiming a new posture of deference toward economic legislation); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding NLRA under a newly expanded view of interstate commerce and Congressional power over economic matters).

241. See *supra* note 239 and accompanying text.

242. For the canonic treatment of this shift, see John Hart Ely, *Democracy & Distrust* 75–77 (1980). According to Ely, the outline of this new project was sketched in footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

where labor activism fit in this dichotomized universe.²⁴³ Was organized labor a social movement that sought to advance the cause of economic justice and equality? In that case, it deserved energetic constitutional protection against hostile legislation. Or was labor simply a market actor jostling for a bigger share of the economic surplus? In that case, the legislature could regulate more or less as it saw fit. Of course, labor could present either face at different times. But how were the courts to view labor's everyday forms of protest and appeals for public support—strikes, pickets, and boycotts in support of representation rights and collective bargaining gains?

For a short time after the enactment of the NLRA, the Supreme Court espoused the former vision of labor as an important social movement deserving of constitutional protection.²⁴⁴ In particular, the Court struck down a state ban on peaceful labor picketing under the First Amendment, proclaiming that the facts of a labor dispute were undeniably "matters of public concern."²⁴⁵ But labor's moment in the constitutional sun proved brief. The pro-labor decisions all came against state and local actions. In hindsight, the Court's brief experiment with constitutional pro-labor rights seems to have served merely as an expedient transitional device in the transfer of authority over labor relations from states to the federal government; for the experiment fizzled once Congress extended its regulatory reach to unions in 1947. From then on, labor protest was relegated to the domain of economic activity, where deference to the legislature ruled the day.²⁴⁶

Deference prevailed even after picketing and boycotts had come to be recognized as constitutionally protected forms of protest in the hands of civil rights activists.²⁴⁷ Organized labor's role as the voice of the down-

243. See Pope, *Shaping*, supra note 25, at 101–03.

244. The lower courts followed with a number of decisions striking down, on a variety of constitutional grounds, restrictions on strikes, boycotts, and picketing. Pope, *Shaping*, supra note 25, at 100–01 (listing cases).

245. *Thornhill v. Alabama*, 310 U.S. 88, 101–03 (1940); see also *Marsh v. Alabama*, 326 U.S. 501, 502–05 (1946) (extending "public forum" doctrine to a privately owned "company town," and recognizing its particular importance to labor organizers, whom owners often sought to exclude); *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (affirming CIO organizer's First Amendment right to speak, as against restrictive local permit requirements); *Hague v. CIO*, 307 U.S. 496, 515–16 (1939) (announcing First Amendment "public forum" doctrine and applying it to protect speech of labor organizers).

246. *Thornhill's* protection of the First Amendment right to picket was severely limited by a number of decisions permitting the regulation of picketing that is found to be for an illegal purpose. See *Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 294 (1957) (declaring that a state's prohibition of peaceful picketing is consistent with the Fourteenth Amendment if the objective of the picketing is illegal under state law). This allowed the legislature—which ever legislature had the authority as a matter of preemption doctrine—to make picketing illegal by making its purpose illegal.

247. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 886 (1982) (holding that NAACP's nonviolent boycott of white merchants was protected under the First Amendment); *Carey v. Brown*, 447 U.S. 455, 466–67 (1980) (stating that picketing of the mayor's home to protest his alleged failure to promote racial integration, was "[p]ublic-

trodden had helped to spur the expansion of constitutional protest rights during the 1940's, and those decisions became a crucial stepping stone for the further expansion of First Amendment rights in the civil rights era.²⁴⁸ But labor did not, in turn, become the beneficiary of those expanded rights, at least not for picketing, its signature form of expression.²⁴⁹ Congress had struck a "delicate balance," and the Court was loath to disturb it.²⁵⁰ The contrast between the Court's vigilant protection of peaceful civil rights picketing and boycott activity and the deference to Congress's ban on virtually identical activity by unions suggests a little of what has been lost in the deconstitutionalization of labor law.²⁵¹

The conventional story of labor's winning its rights in a battle for congressional supremacy is too simple, too, because it ignores the absorbing story of how and why and with what consequences the New Deal labor laws came to be grounded and defended firmly on Commerce Clause grounds rather than on the basis of employee rights and freedoms under the First, Thirteenth, or Fourteenth Amendments. Professor James Pope contends that the constitutional claims of some prophetic voices in the labor movement had enough currency in the early New Deal—more currency, in fact, than the chosen Commerce Clause argument until *Jones & Laughlin* itself—to have served as an adequate constitutional basis for the

issue" picketing protected by the First Amendment); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972) (holding unconstitutional a state law that restricts use of forum for peaceful picketing based on subject matter); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 155 (1969) (holding that First Amendment bans restrictions on peaceful assembly and discussion of public questions in public places); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (declaring that peaceful civil rights protest was exercise of basic constitutional rights).

248. See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 39–46 (1996).

249. The Court recognized constitutional concerns about the ban on secondary consumer picketing, but avoided the question by narrowly construing the ban in *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 63 (1964). But in *Safeco*, the Court applied the ban and resolved its constitutional doubts in Congress's favor, with barely a nod in the direction of the First Amendment. 447 U.S. at 616. Only when Congress's delicate balance appeared to ban the peaceful distribution of leaflets to consumers did the Court depart a half-step from its posture of deference, construing the statutory ban narrowly to avoid what might otherwise have been a serious constitutional objection. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576 (1988).

250. This notion was invoked to explain the lesser protection of labor boycotts as compared to "political" boycotts in *Claiborne*, 458 U.S. at 912–13 (referring to "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife" (citing *Safeco*, 447 U.S. at 617–18 (Blackmun, J., concurring in part))).

251. Compare the civil rights picketing and boycott cases, cited supra note 247, with *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 611 (1980) (upholding NLRA's ban on peaceful consumer picketing of "neutral" employer). Professor Pope aptly likens the curious suspension of constitutional and especially First Amendment principles in the labor arena as a "black hole" of constitutional law. Pope, Ladder, supra note 236, at 196–98.

laws.²⁵² But he argues that labor's just claims were betrayed by progressive New Deal lawyers, who "hijacked the power of the workers' movement to their own project of empowering government regulators and intellectuals . . . at the expense of both labor and capital."²⁵³ Moreover, he contends that grounding the labor laws in the constitutional rights of labor would have mattered: It would have provided a sturdier platform for challenging hostile state legislation and judicial action as well as later congressional retrenchment and for expanding labor rights in the more rights-conscious era that followed.

Professor William Forbath gives a different account: Labor and the New Dealers were fully committed to the constitutional rights of labor. But the era of substantive due process and liberty of contract had left an indelible mark on their conception of the nature of those constitutional rights and the proper forum for vindicating them.²⁵⁴ Labor's vision of the Constitution was deeply democratic and political; it aimed chiefly to inspire and to empower rather than to constrain the legislature.²⁵⁵ In the view of labor and its allies, the Constitution had been misappropriated by the courts and taken away from its truest exponents, the representatives of the people:

Thus a deeply democratic progressive like Wagner could believe that the rights to strike, organize, and bargain collectively through unions were fundamental rights of national citizenship, and yet not want to embed them in the Constitution's rights-protecting provisions. The latter only would authorize and encourage the courts to delineate the boundaries of these newly enacted rights, and courts would do so against a backdrop of inherited and hostile judicial constructions of those very provisions.²⁵⁶

252. See Pope, *Shaping*, *supra* note 25, at 7–10. Professor Pope contends further that, had the NLRA been upheld in 1937 on the basis of the substantive rights of workers, the Taft-Hartley restrictions on labor activity might have been successfully resisted or challenged; the Civil Rights Act of 1964 might also have been planted on the firmer ground of section 5 of the Fourteenth Amendment; and the current Court's narrow reading of those congressional powers would have been foreclosed. *Id.* at 117–19.

253. *Id.* at 11.

254. Professor Forbath argues that the frustration of labor's political program at the hands of the judiciary, together with the even more direct confrontation with the courts' use of the labor injunction to stifle solidaristic labor activity, was a crucial factor in the retreat of the main currents of organized labor away from politics and toward narrow trade unionism. Forbath, *Shaping*, *supra* note 109, at 6–8. But it also shaped the constitutional vision of the progressive mass-based industrial unions.

255. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich. L. Rev. 1, 4–5 (1999) [*hereinafter Forbath, Caste*]. And indeed, Congress clearly intended the NLRA, in part, to extend values of freedom and democracy into the private sector workplace, and these values have informed the interpretation of the law. See Becker, *supra* note 38, at 496; Summers, *Lessons*, *supra* note 5, at 698.

256. William E. Forbath, *The New Deal Constitution in Exile*, 51 Duke L.J. 165, 175 (2001).

Given those commitments and concerns, grounding the labor laws primarily in legislative power was both the sensible and the right thing to do. The New Dealers may have failed to foresee or to forestall the collapse of their legislative coalition in the face of the Southern Democrats' implacable commitment to Jim Crow and to the South's racialized labor market.²⁵⁷ But their commitment to a democratic constitution was genuine and forged in hard experience.

The New Dealers may also have failed to foresee the extent to which the valence of judicial review was changing, even without a continuing congressional commitment to realizing the constitutional rights of labor. The general thrust of constitutional change from the New Deal to the present—if we can imagine that doctrine infusing the analysis of private sector workplace relations—would almost certainly have worked more to the advantage of labor than of management.²⁵⁸ In particular, it might have expanded the protection of unions' peaceful protests and appeals to workers and the public, both on public and private property.²⁵⁹

On the other hand, existing constitutional doctrine would also have worked—indeed, it has worked—more to the advantage of individual employees who oppose unions than of unions as institutions. Among the few constitutional challenges to the Act that have been given a serious hearing, several have come at the behest of individual employees against unions.²⁶⁰ In particular, the Supreme Court has elaborated a rather robust First Amendment “right to refrain” from compelled association and political activity that casts a shadow over the Act’s provisions for “union security” and dues collection.²⁶¹ The Court has construed the statute to

257. Id. at 202–09; Forbath, *Caste*, supra note 255, at 80.

258. For example, since the 1950s, these constitutional provisions have proven to be a fruitful source of employee rights in the public sector. See generally William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968) (commenting on post-New Deal recognition that conditions on public employment may violate employee’s constitutional rights); *Developments in the Law: Public Employment*, 97 Harv. L. Rev. 1611, 1738–97 (1984) (chronicling development of individual constitutional rights of public employees against their government employer). Those legal developments have served, in turn, as a source of inspiration and a proving ground for the state courts’ development of the common law of wrongful discharge in the private sector. See Issacharoff, supra note 5, at 616–17.

259. It might, for example, have tipped the scales in favor of (1) union access to private property in *Lechmere* (a result that the Supreme Court seemed to foretell as it retreated from its brief extension of First Amendment into private shopping malls, see supra notes 141–146 and accompanying text, supra note 243 and accompanying text; and (2) peaceful secondary consumer picketing in the *Safeco* case, see supra notes 241–243 and accompanying text.

260. This follows largely from existing “state action” doctrine: Unions’ power over individuals—for example, the power to act as exclusive representative and to collect dues—derives partly from the labor laws themselves; it draws more on “state action” than employer power over employees is deemed to do.

261. See Brudney, *Famous Victory*, supra note 11, at 1027–28. The conflict between the First Amendment and union security provisions was first noted, and avoided by statutory construction, in *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961), under the

prohibit the compelled exaction of dues to support unions' political objectives, or indeed anything other than the costs "germane to collective bargaining, contract administration, and grievance adjustment",²⁶² notably, that excludes most organizing costs.²⁶³ Of greater practical importance than the reduced ability to collect dues are the detailed accounting, auditing, and escrow procedures the Court has imposed in order to insure that individuals are not being compelled to support objectionable activity.²⁶⁴ Of greater symbolic importance is the Court's implicit ordering of values: The right of objectors to *refrain* from supporting unions and most union organizing is so important that it justifies imposing onerous procedural burdens on the union, while the right of unions and their members to *organize* is so unimportant that, for example, it does not justify imposing the trivial burden on employer's property rights that is entailed by granting organizers access to a parking lot.²⁶⁵

The quasi-constitutional "right to refrain" and its expansion over the years has worked a change in labor law—a change in the unsurprising direction of greater individual rights and weaker collective institutions. It shows one way in which the process of "ossification" is qualified, complicated, and uneven. I will return to these qualifications below. For the moment, the "right to refrain" decisions remind us that the Constitution is still a double-edged sword in the domain of labor law.

For further evidence of that double-edged quality of constitutional law, we need only recall the recent spate of decisions by a bare majority of the current Court limiting congressional power vis-à-vis the states. The Eleventh Amendment's guarantee of the states' "sovereign immunity" has been used to limit Congress's power to subject the states to individual suits for damages; that has limited the rights of public employees under the Fair Labor Standards Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.²⁶⁶ The Court has also begun to demand that Congress justify with extensive factfinding the exer-

Railway Labor Act. The contours of the permissible "agency fee," and the "germane to collective bargaining" requirement, were elucidated in *Ellis v. Bhd. of Ry., Airlines & Steamship Clerks*, 466 U.S. 435 (1984), and carried over to the NLRA in *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988).

262. *Beck*, 487 U.S. at 745.

263. All organizing expenses outside the particular bargaining unit are excluded under the RLA. *Ellis*, 466 U.S. at 452–54. Under the NLRA, the Board has held that expenses for organizing *within the same "competitive market"* are chargeable to agency fee payers, *United Food & Commercial Workers Union*, 329 N.L.R.B. 730, 733–38 (1999), and the Ninth Circuit has upheld that holding. *United Food & Commercial Workers Union*, Local 1036 v. NLRB, 284 F.3d 1099, 1105 (2002) (en banc).

264. See, e.g., *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 874–80 (1998) (describing and expanding procedural rights of agency-fee objectors).

265. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 529–31 (1992) (discussed *supra* notes 143–148 and accompanying text).

266. *Alden v. Maine*, 527 U.S. 706, 706–10 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 62 (2000) (ADA); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363–74 (2001) (ADA). All were 5–4 decisions.

cise of its enumerated powers, especially under the Commerce Clause and the Fourteenth Amendment.²⁶⁷ As yet, these federalism decisions have not cut into Congress's power to regulate private sector employment; ironically enough—given that the showdown over the New Deal took place on precisely that terrain—regulation of the private sector workplace now seems to be understood as lying within the core of Congress's domain under the Commerce Clause. Indeed, the recent cases have not yet cast doubt even on the broad scope of implied federal pre-emption.²⁶⁸ But it is hard to say where the Court is headed. Having brought to a close the post-New Deal era of expanding individual rights of liberty and equality, the Court's intellectually-ambitious conservative majority appears to have found a new arena in which to flex its most powerful muscles and command the national stage through the extraordinary power of judicial review.²⁶⁹ It is not clear that they have reached the limits of their ambitions.

Once again, it is difficult—and not the immediate purpose of this exercise—to predict where a more constitutionalized conception of labor rights would have led. But one can predict that it would have opened pathways of legal challenge and of change that have instead remained closed.

C. *The Neglect of Transnational Labor Law*

The last chapter of this story is the shortest. International human rights, including labor rights, have made almost no discernible mark upon American domestic law. That is not because the United States rejects the existence of international human rights in the labor context; the rights of workers to associate freely and to form unions are long established and widely recognized human rights, and are recognized by the United States as such.²⁷⁰ But the United States does not embrace the full

267. See *United States v. Morrison*, 529 U.S. 598, 607–19 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 529–36 (1997); *United States v. Lopez*, 514 U.S. 549, 563 (1995). Except for *City of Boerne*, which was decided by a 6–3 vote, all these decisions, too, were decided 5–4. Among the extensive critical commentary on the Court's recent federalism decisions, see especially Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 Yale L.J. 441 (2000); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 Mich. L. Rev. 80 (2001).

268. I suggest below that they might yet do so—not, one hopes, on the basis of constraints on Congress's power to regulate labor markets, but on the basis of its failure to clearly state its intent to oust states from concurrent regulation.

269. Ironically, the current Court's redeployment of judicial review in some ways mirrors that of the New Deal Court, which, having ended the era of searching judicial review in support of "liberty of contract" and strict construction of congressional powers, promptly ushered in an era of judicial activism on behalf of civil rights and civil liberties.

270. See International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work (1998), available at <http://www.ilo.org/public/English/standards/decl/declaration/text/index.htm> (on file with the *Columbia Law Review*). Other internationally recognized labor rights include freedom from forced labor, child labor, and employment discrimination. *Id.*

scope of the obligations that international law imposes on states with respect to those rights. If it did, or if there were more effective mechanisms for the enforcement of international norms, then international law would provide critical traction for efforts to expand and invigorate the protection of workers' associational activity.

At first glance, American labor law might not seem to be an appropriate target of international human rights scrutiny, for it affords associational rights and remedies that would be hard to place below some minimum international standard. Unlike in many nations, "U.S. workers generally do not confront gross human rights violations where death squads assassinate trade union organizers or collective bargaining and strikes are outlawed."²⁷¹ But international human rights standards require more than the abstention from state repression of associational activity, and more than the formal protection of such activity; they require that states affirmatively and effectively protect the freedom of workers to associate and to form unions.²⁷² The United States government has not embraced the affirmative dimension of international labor rights (though it is bound by the instruments that establish it),²⁷³ and it is primarily on that score that American law falls short.

International human rights advocates have thus criticized the notoriously patchy enforcement of basic rights, even for those workers covered by the NLRA. The criticisms are familiar: Given paltry remedies and long delays, "[m]any employers have come to view [legal sanctions] as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers' organizing efforts. As a result, a culture of near-impunity has taken shape in much of U.S. labor law and practice."²⁷⁴

In a system replete with all the appearance of legality and due process, workers' exercise of rights to organize, to bargain, and to strike in the United States has been frustrated by many em-

271. Lance Compa, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* 8 (2000), available at <http://www.hrw.org/reports/2000/uslabor/USLBR008-02.htm> (on file with the *Columbia Law Review*) [hereinafter Compa, *Unfair Advantage*].

272. The International Covenant on Civil and Political Rights declares: "[E]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." Id. at 41–42 (quoting International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 22, 999 U.N.T.S. 171). The ICCPR, which the United States ratified in 1992, requires ratifying states "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant"; "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant"; and "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy." Id.

273. See Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 387 & n.15 (1993) (noting that "the US was unsuccessful with its motion in the H. R. Comm. to protect freedom of association only against 'governmental interference'").

274. Compa, *Unfair Advantage*, *supra* note 271, at 10.

ployers who realize they have little to fear from labor law enforcement through a ponderous, delay-ridden legal system with meager remedial powers.²⁷⁵

So the critical bite of international law depends largely on whether one examines American labor law on the books or the law in action. Underenforcement is not the only problem with American labor law. Human rights advocates have criticized the outright exclusion of some highly vulnerable groups—for example, agricultural workers—from the formal protections of the Act.²⁷⁶ They have also criticized particular provisions of the law, such as the failure to ban the permanent replacement of strikers, the prohibition of secondary and sympathetic labor activity, and the protection of employer opposition to union activity, as inconsistent with international obligations to protect and promote workers' associational and organizational rights.²⁷⁷

The official American view is that international human rights are endangered elsewhere, and that American labor law is a model for the rest of the world.²⁷⁸ The rest of the world may not be convinced that American labor law, old and flawed as it is, is a model for the modern world. But more to the present point, American legal institutions and decisionmakers have thus far been deaf to the claim that international labor law provides a potential model for American labor law, or even a critical vantagepoint from which to view American labor law.

International human rights principles are not the only potential source of transnational law in the labor arena. In other parts of the world—most notably Europe—regional legal instruments and institutions have had enormous transformative power in the labor and employment setting.²⁷⁹ The closest analogue for the United States is the North American Free Trade Agreement, which does have a “labor side agreement.”²⁸⁰

275. *Id.* at 16.

276. *Id.* at 94–113.

277. See generally Compa, *Unfair Advantage*, *supra* note 271 (chronicling inconsistencies between international human rights standards and American labor law and its enforcement); James A. Gross, *A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association*, 3 *Employee Rts. & Emp. Pol'y J.* 65 (1999) (same).

278. For example, “[b]efore 1999, U.S. reports to the ILO on compliance with freedom of association standards offered boilerplate descriptions of American labor law and asserted that U.S. law and practice appears to be in general conformance with Conventions 87 and 98.” Compa, *Unfair Advantage*, *supra* note 271, at 47 (internal quotations omitted).

279. See Sarah Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 *Tex. L. Rev.* 1533, 1542–44 (1998) (book review). Harmonization does not extend, however, to collective labor rights—to “labor law” as defined here—within the European Union countries.

280. The North American Free Trade Agreement (NAFTA) among the United States, Canada, and Mexico incorporates a labor side agreement, the North American Agreement on Labor Cooperation (NAALC), the first three principles of which are freedom of association and the right to organize, the right to bargain collectively, and the right to strike. *North American Agreement on Labor Cooperation*, Sept. 13, 1993, Annex 1, Labor

This regional labor agreement, unlike the European social charter, does not prescribe “harmonization” of labor standards, or contain substantive minimum standards; it does commit member states to realize certain basic labor principles—the first three of which are the right to associate freely and to organize unions, the right to bargain collectively, and the right to strike—and to enforce their own laws through their own tribunals.²⁸¹ That agreement, by design, provides no source of extranational legal norms and no leverage in challenging the letter of American labor law—neither its substantive content nor even its prescribed remedies. Even with respect to the commitment to enforce existing domestic law, it is noteworthy that, with respect to the first three labor principles, the agreement provides only for “discussion”; it does not provide for sanctions or even for expert reports.²⁸²

Unlike the peculiarly broad reach of labor law preemption or the peculiarly limited role of the federal Constitution in labor law, the insulation of American labor law from transnational and international legal scrutiny is not peculiar to labor law. The same official resistance to the application of international human rights standards within American borders meets international criticism of the death penalty or of police brutality.²⁸³ Human rights and labor rights advocates are actively exploring the uses of international and multilateral legal instruments and institutions in supplementing domestic law enforcement mechanisms.²⁸⁴ As things

Principles 1–3, available at <http://www.naalc.org/english/infocentre/NAALC/NAALC9.htm> (on file with the *Columbia Law Review*) [hereinafter NAALC].

281. The agreement commits the United States to promote the NAALC labor principles and to “effectively enforce its labor law” to realize them. *Id.* at art. 3; see Cleveland, *supra* note 279, at 1544–45. Katherine Stone characterizes NAFTA as “com[ing] close to a no-regulation regime.” Katherine Van Wezel Stone, Labor and the Global Economy: Four Approaches to Transnational Labor Regulation, 16 Mich. J. Int’l L. 987, 1028 (1995).

282. See Mary Jane Bolle, NAFTA Labor Side Agreement: Lessons for the Worker Rights and Fast-Track Debate, CRS-4 fig.1 (Oct. 9, 2001) (Congressional Research Service report), available at <http://www.cnre.org/nle/crsreports/economics/econ-122.pdf> (on file with the *Columbia Law Review*).

283. See Catherine Powell, Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States, 150 U. Pa. L. Rev. 245, 259–60 (2001).

284. Indeed, one might discern a new “global labor law” emerging out of a combination of international treaties and conventions, corporate codes of conduct in multinational corporations, and the dissemination of “best practices” for the development of productive “human capital.” Harry Arthurs, Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture, 22 Berkeley J. Emp. & Lab. L. 271, 286–91 (2001). Arthurs acknowledges:

This new labor law has not yet begun to affect U.S. domestic labor law, but it is gradually beginning to shape relations between transnational employers and their workers, and to influence the industrial relations and labor law systems of many of America’s trading partners and competitors. In the long run, therefore, it may leach back into the United States, just as it did under the New Deal and during the postwar period.

Id. at 286.

stand, the labor arena is simply one of many in which the critical and transformative potential of transnational law remains untapped by domestic American legal institutions.²⁸⁵ And among the barriers to labor law reform, the resistance to transnational law is, to quote Pink Floyd, “just another brick in the wall.”²⁸⁶

IV. REFLECTIONS ON THE OSSIFICATION (AND DEOSSIFICATION) OF LABOR LAW

So we find that virtually all of the normal institutional channels of legal change are clogged or blocked in the case of labor law. That is the main theme of this story. But having labored to persuade the reader of the sadly sclerotic state of American labor law, I might reasonably be expected to suggest some implications. To put it bluntly: So what? So here I offer some further reflections on the ossified state of labor law, in four parts: First, stepping back from the particular hurdles to change, what is the overall shape of the problem? Second, who are the winners and losers? On whom does the burden of ossification fall? Third, what law reform strategies are suggested by the ossification thesis? Fourth, what extralegal reform strategies are taking shape in the wake of ossification, and where are they going? Ultimately, I conclude that ossification, by pushing organized labor outside prescribed legal channels and into the streets, may have laid the groundwork for its own demise.

A. *Taking Stock of the Problem of Ossification*

During the course of this tour of the numerous institutional obstacles to change, it has been clear that the various blockages often work in tandem. In particular, the inability of either side’s congressional allies to assemble the supermajority needed to amend the statute makes all of the other blockages more intractable. So, for example, the lack of a private right of action and the strictures of section 8(a)(2) were put in place deliberately by a Congress that has been unable to revisit its choices. Pre-emption doctrine is the work of a Court seeking to discern the intent of a Congress that has proven incapable of expressing or revising its intent. Much-criticized doctrines such as *Mackay*’s rule on permanent replacements and *Babcock & Wilcox*’s strictures on union access to the workplace began relatively innocuously as judicial glosses on the statute, but they have become stubborn encrustations through decades of congressional deadlock. The constitutional deference to the “delicate balance struck by

285. To be fair, the resistance to international law in the labor arena is not even distinctly American. When Harry Arthurs interviewed forty management lawyers in seven countries, “[t]hey were unanimous: international labor standards do not affect their advice-giving or advocacy functions. Labor law is local law, plain and simple.” Arthurs, *supra* note 284, at 274–75. On the other hand, “lawyers in every country I surveyed (other than the United States) acknowledged that globalization had significantly influenced the content and administration of their national labor law.” *Id.* at 277.

286. Another Brick in the Wall, *on The Wall* (Columbia Records 1979).

Congress" has become a prescription for rigidity given Congress's inability to refine or restrike the balance.

The lynchpin of the process of ossification appears to be the congressional impasse. If congressional action on labor law reform were within reach—say, on a more simply majoritarian basis—then all of the other blockages together would not produce ossification. By the same token, with no change in the operative text, only relatively incremental changes remained possible. That being said, the courts bear at least secondary responsibility for the ossified state of labor law. Their unusually expansive preemption doctrine, their skewed but stingy approach to constitutional review, and especially their obstructionist oversight of the Board have all operated to constrict what little room for change remained in the wake of congressional inaction.

Change has thus been blocked along many fronts, but it has not ceased altogether. Changes in preemption law, for example, have tended to make more room for state and local action against union activity and to strengthen the barriers to state and local action that would otherwise tend to favor employees and unions. Changes in constitutional law, as well as changes in judicial attitudes toward collective rights, have strengthened the hands of employers and of individuals seeking to refrain from collective activity and weakened the hand of unions. Most of the legal change that has come about has tilted against unions as institutions and against the collective interests of workers vis-à-vis employers, and in favor of employer prerogatives and property rights and of workers who oppose unions.

But then ossification is not the same as stasis. The term aptly implies a process of hardening, of congealment, of increasing rigidity. That is a fair characterization of what has happened to labor law since the 1950s. By itself, the gradual build-up of judicial interpretations of the Act—practically invulnerable to legislative revision—inevitably introduces rigidity by narrowing the range of alternative readings over time. On the whole, the legal changes that have taken place since the 1950s are relatively minor in relation to the changes in the labor market and the economy that have not been addressed within labor law and that have rendered the law increasingly irrelevant. So we find that section 8(a)(2) has not changed in almost seventy years, but organizational practices have changed, sometimes in defiance of the law. A large body of workplace rights and regulations—all of what has become known as “employment law”—has grown up without any serious integration with “labor law,” leaving unorganized employees with little or no voice, and unions with little or no formal role, in the implementation of laws governing civil rights, health and safety, or other conditions of work. In particular, the law has failed to keep up with employers’ willingness and ability to combat unionization, and it has failed to back up workers’ associational rights with the same vigor that the law has brought to the enforcement of an array of new workplace rights.

The law has thus failed to afford union organizers access to the workplace even as employees have become increasingly dispersed, mobile, and hard to reach outside of the workplace, and even as employer property rights have been whittled down in other contexts. It has failed to revisit, or at least recalibrate, the anachronistic and atavistic clash of economic weapons as a means of settling economic disputes even as employers have become more willing to use their most destructive weapon of permanent replacement, and even as alternate mechanisms of dispute resolution have proliferated elsewhere in the law. It has failed to develop faster mechanisms for determining employees' choices about representation even as employers find ever more creative ways to delay the resolution of elections and to use that delay to their advantage. Most importantly, the law has failed to develop remedies or penalties that deter employer reprisals against union supporters even as employers have become more aggressive in their pursuit of a "union-free" workplace.

As the law's failings become increasingly evident, the continuing lack of congressional action becomes more puzzling. For the congressional deadlock over labor law reform reflects not only the intensity and unanimity of employer opposition but also the inability of unions and employee advocates to produce a sense of crisis, of outrage over the widespread disregard of associational rights, and of distress over the near collapse of the only legally sanctioned institutional vehicle of employee participation in the governance of their workplaces.²⁸⁷ "We are a nation of employees," it is said;²⁸⁸ yet we employees cannot muster a large enough majority in Congress to put our rights of self-organization on a par with other employee rights, or to make real our right to bargain on a more equal footing with employers over wages and working conditions. It is not simply that the large and diverse employee class is divided over the need for labor law reform; there is not much disagreement about the right to choose union representation. Indeed, divisions among employees would seem more likely with respect to the vast body of employment discrimination law, which continues to grow new branches and offshoots. The impasse over labor law reform reflects in part the comparative lack of moral fervor that is stirred in the United States by the ideas of freedom of association and democracy in the workplace. On the hierarchy of moral and political imperatives, employees' rights of collective self-determination seem to rank at least a notch below rights against status-based discrimination.

287. For a thoughtful examination of the lack of a sense of crisis or urgency associated with labor law reform, see Brudney, *Reflections*, *supra* note 37, at 1591–95.

288. *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 509 (N.J. 1980); see also Frank Tannenbaum, *A Philosophy of Labor* 9 (1951) ("We have become a nation of employees"), quoted in Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404, 1404 (1967), and in numerous judicial decisions, e.g., *Geary v. U.S. Steel Corp.*, 319 A.2d 174, 176 (Pa. 1974).

Organized labor bears some responsibility for that fact. To be sure, Taft-Hartley stripped labor of some of its most potent means of galvanizing class-wide solidarity.²⁸⁹ But the labor movement that emerged in the wake of those restrictions gave up much of its fight and much of its identification with the downtrodden and marginalized segments of the working class. Labor laid aside the banner of economic justice, freedom, and democracy in the 1950s in order to take its place at the table with management and secure more and better terms for the relatively privileged workers it already represented.²⁹⁰ In the last decade or so, labor has sought to reclaim that banner. But in the intervening decades the banner itself became faded and frayed. That is both a cause and an effect of labor law's ossification, and it is a problem to which we will return.

B. *Ossification's Winners and Losers*

The consequences of ossification are hard to discern with any degree of precision. Who knows what statutory reforms might have been enacted under a less paralyzed, less polarized Congress? Or what doctrinal innovations might have arisen through the adjudication of private claims? But from a few steps back, and given a few basic premises of the American labor laws, the overall consequences of ossification appear quite clear and quite lopsided.

The first premise is that employees—specifically, a majority of the relevant group of employees—must affirmatively choose to organize a collective voice. In other words, any new firm, and virtually any new operation or location, begins from a non-union baseline. The sub-premise of majority rule—a uniquely American provision—has come under scholarly scrutiny.²⁹¹ The non-union baseline has only rarely been ques-

289. Atleson, *supra* note 33, at 47; Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960*, at 282–316 (1985). The amendments also pressured the labor movement—through the non-Communist affidavit requirements—to purge the more militant and radical unions and union leaders from its own ranks. *Labor Management Relations (Taft-Hartley) Act*, ch. 120, sec. 101, § 9(f), 61 Stat. 136, 145 (1947) (repealed 1959). The impact of the anti-Communist purge of the labor movement is assessed in Lichtenstein, *supra* note 24, at 782–85. Among other things, he argues, “the elimination of the Communists from much of American political life fatally diminished the role that the trade unions would play in the emergence of the Civil Rights Movement and the New Left just a decade later.” *Id.* at 785.

290. In 1972, George Meany, head of the AFL-CIO from 1955–1979, succinctly captured what was then the attitude of organized labor’s leadership: “Why should we worry about organizing groups of people who do not appear to want to be organized? . . . I used to worry about . . . the size of the membership. But quite a few years ago I just stopped worrying about it, because to me it doesn’t make any difference.” U.S. Needs 30,000 New Jobs a Week Just to Break Even, *U.S. News & World Rep.*, Feb. 21, 1972, at 27–28.

291. Several leading labor law scholars have encouraged serious consideration of a members only, nonmajority form of representation, as exists in most industrialized countries. See Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 Chi.-Kent L. Rev. 195, 218 (1993); George Schatzki, *Majority*

tioned.²⁹² That baseline is not logically inevitable, even in a regime committed to employee “free choice.” A stronger attachment to industrial democracy might direct us to the opposite baseline.²⁹³ But the non-union baseline is sufficiently unquestioned in the American context—even by unions—to be taken for present purposes as a given. And it is a very big given. It means that, in an economy characterized by “creative destruction,” in which old firms shrink and die and new ones are born and grow, the forces of entropy alone tilt strongly against collective representation.²⁹⁴ The non-union baseline means that, even without the threat of “decertification,” or the ouster of union representation, constant new organizing is necessary simply for unions to keep from disappearing from the scene.²⁹⁵

We should also take it as given that union organizing takes place against the nearly uniform backdrop of employer opposition. Opposition to unions has a rational core, given the higher labor costs and lower profit margins that unionization tends to bring.²⁹⁶ That rational core is

Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?, 123 U. Pa. L. Rev. 897, 919–26 (1975); Clyde W. Summers, Questioning the Unquestioned in Collective Labor Law, 47 Cath. U. L. Rev. 791, 795–801 (1998). The single greatest advantage of abandoning majority rule (and “exclusive representation,” with which it is paired) is that it would alleviate the need for elections. Of course, majority rule is one of the features of the NLRA that might have been revisited in a less ossified regime.

292. Exceptions are Weiler, *Governing*, *supra* note 5, at 228, and, more recently, Cass Sunstein, *Human Behavior and the Law of Work*, 87 Va. L. Rev. 205, 256–57 (2001) (discussing possible alternatives to non-union default).

293. It is certainly possible to imagine a system that guaranteed employee representation within firms of a certain size, and required regular elections in which representatives may be chosen or representation itself rejected. Workplace democracy would then look a little bit more like political democracy, which guarantees representation and establishes a mechanism by which the representatives may be chosen. Of course, political democracy is more than a default principle under the Constitution; the people cannot choose to be ruled autocratically.

294. Once a majority does choose union representation, the burden of inertia shifts, and employees must generally make an affirmative choice to exit the union. It has been argued that, by putting hurdles in the path of decertification of an existing union, the Act fortifies a union status quo much as it fortifies a non-union status quo. See Samuel Estreicher, *Deregulating Union Democracy*, 2000 Colum. Bus. L. Rev. 501, 506–07. But the apparent symmetry is misleading (even apart from the fact that the initial status quo for any new workplace is non-union). In case of a contest over decertification, the employer (who will still be there whatever the result of a decertification vote) often puts its weight on the side of decertification; while the law limits employers’ active involvement in the decertification process, the mere fact of their approval makes it much easier for employees (who need their jobs and the employer’s goodwill) to get rid of a union than to get a union.

295. According to some observers, “[m]ore than 300,000 new members must be recruited each year merely to keep up with the growth of the labor force and compensate for the thousands of union jobs lost each year as a result of layoffs and plant closings.” Bronfenbrenner, *Introduction*, in *Organizing to Win*, *supra* note 10, at 3.

296. Labor economists generally agree that unionization is sometimes associated with higher productivity, but that it is also, and more reliably, associated with higher labor costs

surrounded by layers of ideological attachment to unfettered managerial power and the prerogatives of ownership. But whatever historical and cultural contingencies may help to explain the depth of employer opposition to unions in the United States, that opposition is sufficiently enduring to be taken as a given here. Not only do most employers strongly prefer to operate non-union, but they have the economic power to impose that preference on their employees if the law does not effectively intervene. They own the workplace, and they effectively own the employees' jobs under the prevailing American presumption of employment at will.²⁹⁷

These few observations carry us a good distance toward an assessment of the overall impact of ossification: Given that employees must make an affirmative choice to organize themselves, that employers almost invariably oppose that choice, and that they have the economic power to back up their opposition, it is evident—and it is a basic assumption of the Act—that employees need the law's help in order to have a real choice with respect to self-organization. That being the case, weakness and ineffectuality in the law operate to fortify the non-union baseline. And weakness and ineffectuality have been among the clearest consequences of the law's obsolescence. Rigidity in the face of change has crippled the law's capacity to protect employees' associational rights. It has buttressed the non-union baseline from which workplaces and workers begin, and allowed the "creative destruction" and the deliberate deunionization of organized workplaces to outrun the pace of new organizing.

If we then couple the law's ineffectuality in protecting employees' ability to move off the non-union baseline with the law's nearly seventy-year-old prohibition of employer-sponsored alternative forms of employee representation, it is clear that the ossification of labor law accounts

and lower profit margins. See David G. Blanchflower & Richard B. Freeman, *Unionism in the United States and Other Advanced OECD Countries*, in *Labor Market Institutions and the Future Role of Unions* 56, 69 (Mario F. Bognanno & Morris M. Kleiner eds., 1992). There are models of cooperative "mutual gains" labor relations in the union setting. See Thomas A. Kochan & Paul Osterman, *The Mutual Gains Enterprise: Forging a Winning Partnership Among Labor, Management, and Government* (1994); Commission on the Future of Worker Management Relations, U.S. Dep't of Lab. & U.S. Dep't of Commerce, Fact Finding Report 1 (1994). But those models depend on managers giving up some of their cherished prerogatives and accepting unions as partners. As long as it remains feasible for a firm to remain non-union, to deunionize, or to relegate unions to a shrinking base of operations within the firm, managers have little motivation to make the great leap from the familiar ground of managerial prerogatives and mistrust toward unions to the unfamiliar ground of joint decisionmaking and mutual trust. And as long as few managers have made that leap, it is hard for unions to demonstrate their ability and willingness to serve as productive partners to managers who do.

297. The literature on employment at will—the presumed right of employers to discharge an employee (and of employees to quit) for good reason, bad reason, or no reason at all—is vast. One thoughtful recent meditation on the peculiarity and the importance of employment at will is Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. Pa. J. Lab. & Emp. L. 65 (2000).

for a significant part of the “representation gap” between the voice employees have and the voice they say they want in workplace governance.

Of course, this all follows not just from ossification itself, but from the content of the labor law regime that has gotten ossified. Things would look quite different had the process of ossification set in before 1947—if President Truman’s veto of Taft-Hartley had been sustained, and the original New Deal regime, together with “non repugnant” state regulation of union conduct, still reigned.²⁹⁸ Things would look even more different if the process of ossification had set in sooner—if the original, quasi-corporatist National Recovery Act, with its scheme of supervised self-governance by unions and industrial associations, had been upheld and gotten locked in place.²⁹⁹ But the regime that has in fact become locked in place—a hybrid product of the later New Deal and the post-World War II anti-union backlash—left both unions and the Board rather feeble and toothless in the face of growing employer resistance to independent collective representation.

Simply stated, the burden of ossification falls mainly on those who depend on a functioning labor law to defend their interests—that is, on unions, their members, and especially the unrepresented employees who want independent representation. That is why the proponents of unions and collective bargaining have mounted several major campaigns for labor law reform, while employers’ allies have mostly been content to sit back and monitor the aging process.

C. Some Strategies for Law Reform in the Face of Ossification

The account so far has emphasized the striking multiplicity of the blockages to labor law reform and innovation. But in doing so, it has also

298. Professor Pope offers an intriguing counterfactual tale about how Taft-Hartley might have been avoided, and how that might have affected labor, the labor law, and the Constitution. See Pope, *Shaping*, supra note 25, at 115–19. His account depends not on labor law’s having become ossified sooner, but on its having been tethered to a more vital and labor-friendly constitutional foundation in the Thirteenth Amendment. By contrast, the defeat or repeal of Taft-Hartley alone—without a different vision of what labor’s rights under the Wagner Act (or the Constitution) entailed—would have made a more modest difference in labor relations and in organized labor’s outlook. For even an unadulterated Wagner Act would have been accompanied by a body of “non-repugnant” state law regulating union activity. See *supra* text accompanying notes 192–194. All indications are that this would have included bans on a wide range of secondary activity; for example, even before Taft-Hartley, such activity was held to have an “illegal objective,” and to be punishable, notwithstanding the federal protections of section 7. See *supra* note 226 and accompanying text. On the other hand, this mixed federal-state regime would probably have been more amenable to change through political action and possibly constitutional challenge than the current regime has been.

299. William Forbath proposed to me this provocative thought experiment. If we can imagine that early New Deal regime becoming entrenched, it might conceivably have led toward a more European-looking regime of codetermination at the firm level and even of nationwide “peak bargaining” between organized labor and management over the basic terms of the social contract.

highlighted the many pathways through which change might take place. Are there some bricks in the wall that might be dislodged, and that might put some larger process of useful change in motion? Does the phenomenon of ossification suggest any strategies for “deossification”?

Proponents of change might point to the problem of ossification as a reason to curb the force of stare decisis in the case of old labor law decisions. The logic of a strong presumption of stare decisis in statutory interpretation depends on the legislature’s presumed ability to correct or revise judicial interpretations.³⁰⁰ But if the past forty years are any guide, it is manifestly unrealistic to expect Congress to step in to correct judicial misinterpretations of the NLRA. In view of the multiple, longstanding obstacles to labor law reform from within and from without, the inherently flexible rule of stare decisis should be softened to allow for the reinterpretation of the many open textured provisions of the Act.³⁰¹ In particular, judicial interpretations that were not themselves dictated by the text—for example, *Babcock & Wilcox*’s restrictions on organizer access to the workplace—should be open to reexamination by the Board in light of changed conditions.³⁰²

The argument can be restated in *Chevron* terms: *Chevron* dictates judicial deference to the reasonable resolution of legal issues that the statutory text leaves unresolved by the agency charged with administering the statute.³⁰³ One purpose of the doctrine is to afford agencies the flexibility to respond to change, and to change policies, within the textual limits imposed by their Congress.³⁰⁴ The multiple obstacles to legal change through other channels, as well as the wide interpretive latitude afforded by the text of the NLRA, are reasons to grant the Board the full measure of *Chevron* deference rather than the half measure it receives now.³⁰⁵ Indeed, one might contend for a kind of retroactive application of *Chevron*,

300. According to Professor Eskridge, “[s]tatutory precedents . . . often enjoy a super-strong presumption of correctness,” largely because of the legislature’s presumed ability to correct incorrect interpretations. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L.J. 1361, 1362, 1365–67 (1988); cf. Lawrence C. Marshall, “Let Congress Do It”: The Case for an Absolute Rule of Statutory Stare Decisis, 88 Mich. L. Rev. 177 (1989) (criticizing presumption that Congress’s failure to overrule a judicial interpretation signals acquiescence, but arguing on separation of powers grounds for an absolute rule of stare decisis in statutory cases).

301. Even absent unique obstacles to congressional action (but partly in view of the ordinary obstacles), Professor Eskridge calls for a softer “evolutive” approach to statutory interpretation, in which open textured statutory language, and old precedents interpreting that language, could be revisited in light of changed circumstances. See Eskridge, *supra* note 300, at 1385–91.

302. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

303. *Chevron U.S.A., Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837 (1984).

304. *Id.* at 863–64 (stating that courts should defer to an administrative agency’s construction of the statute it administers, and should afford an agency the flexibility to consider “the wisdom of its policy on a continuing basis”).

305. *Chevron* lives a rather crabbed existence within labor law; that means that more than the ordinary number of judicial interpretations (revisable only by Congress) continue to accumulate. See *supra* notes 132–142 and accompanying text.

through which the Board would be able to revisit old judicial resolutions of textual ambiguities that, in a *Chevron* world, would have been left to the agency. *Babcock & Wilcox* was such a judicial resolution; under the proposed approach, *Lechmere*, in which the Board had sought to revise that resolution, should have come out differently.³⁰⁶

Another point of entry might be the Supreme Court's recent federalism decisions, the gist of which seem vaguely in tension with the broad scope of federal labor law preemption. To be sure, even the recent decisions that constrict congressional power cast little doubt on whether Congress has the power to regulate labor relations as thoroughly and as preemptively as it is deemed to have done.³⁰⁷ But other decisions demand a clear indication of congressional intent to exercise its powers in the face of federalism concerns.³⁰⁸ Suppose the Court were belatedly to recognize that states and municipalities have sufficiently strong interests in the peacefulness and fairness of industrial relations within their boundaries to trigger this "clear statement" requirement.

Congressional intent to override conflicting state regulation is certainly clear where federal law establishes affirmative rights, as it does in section 7; state laws or decisions that infringe on those section 7 rights—for example, by banning protected forms of advocacy or peaceful economic pressure by employees and unions—would be preempted even under a minimalist notion of federal supremacy. But the same cannot be said of state laws that support those employee rights by supplementing federal remedies, where they infringe on no competing federal employer rights. Some further "clear statement" by Congress might thus be required in order to preempt states from affording a damages remedy, by statute or by common law, to employees fired for supporting a union.

306. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). It may seem naïve to suggest that the Supreme Court might be persuaded to set aside its often-apparent skepticism toward the Board's wisdom in carrying out national labor policy. But one should bear in mind that many of the decisions that reflect that skepticism, including the recent *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275 (2002), were decided by a single vote.

307. See *United States v. Morrison*, 529 U.S. 598, 610 (2000); *United States v. Lopez*, 514 U.S. 549, 560 (1995).

308. It has been described as an "ordinary rule of statutory construction" that "if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Mich. Dep't. of State Police*, 491 U.S. 58, 65 (1989) (internal quotations omitted); see also *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001) (indicating need for clear indication of congressional intent when administrative interpretation of legislation would encroach on state power); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (repeating requirement of clear statement of congressional intent to abrogate states' Eleventh Amendment immunities); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (same); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."). See generally William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 597 (1992) (describing the clear statement rule as a textualist commitment to federalism).

Nor is Congress's preemptive intent necessarily clear with respect to state laws that prohibit a broader range of employers' anti-union conduct than does federal law—that effectively redefine employers' property rights—unless the laws infringe a federal right to engage in that conduct. And to the extent that employers' federal rights have been inferred from the overall scheme of industrial relations—as in the case, for example, of employers' right to permanently replace strikers or otherwise to use their economic power against employees engaged in protected activity—a more cautious Court, or one more consistently sensitive to state prerogatives, might demand a clearer statement of Congress's intent to recognize those rights and thus oust state regulation.

Judicial decisions revisiting and narrowing the scope of federal pre-emption along these lines might provoke a congressional response—an explicit statement, or even a reaffirmation, of the Act's preemptive effect—or they might not.³⁰⁹ Alternatively, of course, an appeal might be made directly to Congress—this time with the support of state and local governments that have been frustrated in their efforts to regulate labor relations in ways that are consistent with the explicit terms of federal law—for enactment of a narrower express preemption provision. Either way, this approach to labor law reform introduces a set of concerns and constituencies that cut across the lines that so sharply divide the partisans of labor management. Of course this approach to labor law reform is also exceedingly incremental, as it leaves untouched the existing scheme—insofar as it is explicitly embodied in the NLRA—and works around its edges and within its interstices. But it could lead to a proliferation of state and local variations that would change the labor climate in many jurisdictions and potentially point the way toward nationwide reforms.

Another potential chink in the wall is section 8(a)(2). There would still appear to be a constituency for permitting employers to explore alternative, non-coercive forms of employee participation.³¹⁰ If something like the TEAM Act were passed again by Congress under a Republican administration, it would presumably become law. We would expect employers, in response to this change, to explore alternatives that looked a bit more like unions—that allowed employees a direct voice, through dis-

309. Application of the "clear statement" requirement to labor law preemption would of course shift the burden of ossification—specifically, of the congressional impasse—onto the forces that oppose greater state and local authority over labor relations; if I am right about the logic of a narrower preemption doctrine, that would presumably be employers. They and the proponents of retaining a broad preemption doctrine would object to the "clear statement" requirement on the ground that Congress has by now ratified and come to rely on existing doctrine. But ratification should not be inferred from congressional silence where that silence is a product of an unusually durable deadlock over amending the NLRA.

310. On the other hand, given their ability to operate these programs "under the radar," employers may not value section 8(a)(2) reform enough to risk opening the door to other labor law reforms they oppose.

cussion and give-and-take with managers, in matters of compensation, working conditions, schedules, and other matters that current law places off-limits for employee involvement plans.

Assuming that the law continued to police against the use of employee committees to fend off unionization efforts, and continued to enforce employees' right to seek independent representation, even in the presence of an employer-sponsored representation scheme, it is not clear how this reform would cut with respect to the former. Some evidence suggests that employees who have been introduced to the forms and norms of collective representation may be more receptive to union organizing efforts—at least where the employer sponsored mechanisms disappoint employee expectations—than those who have not.³¹¹ Of course, if that turned out to be the case, employers might not be so quick to jump into the space opened by reform of section 8(a)(2). But many employers might be willing to accept that risk in the belief that greater employee involvement will redound to the benefit of the firm. At a minimum we would see more fluidity and experimentation, and more information about the effects of different plans on productivity and employee satisfaction.³¹²

The “federalism” vector might also intersect with the “employee involvement” vector in the form of state laws mandating employee participation through committees on safety or other workplace issues. Indeed, eleven states have laws mandating employee safety committees, though they seem to be a virtual dead letter in non-union workplaces.³¹³ What would happen if employee advocates—including unions—pushed for the establishment of these committees and sought to make them effective vehicles of employee participation in workplace governance, as Professor Finkin urges them to do?³¹⁴ The committees might run afoul of section 8(a)(2), but they might not if they are either sufficiently independent from employer control or endowed with actual managerial authority.³¹⁵

311. See *supra* text accompanying notes 103–104.

312. Indeed, the risk of unionization by that route might eventually appear less threatening than it now appears, for union “capture” of employer-initiated plans might produce more enterprise based, local bargaining led by employees themselves. It might yield hybrid forms of employee representation that expand employees’ collective voice and that work cooperatively with management for the success of the enterprise. Experience (and competition) with employer-sponsored forms of representation might push unions in the direction that some labor economists urge: toward the “voice” face and away from the “monopoly” face of traditional unions. See David G. Blanchflower & Richard B. Freeman, *Unionism in the United States and Other Advanced OECD Countries*, 31 Indus. Rel. 56, 77 (1992) (“To recover in the next decade, U.S. unions will have to emphasize their collective voice role, . . . experimenting with new initiatives, and developing a new brand of unionism.”).

313. See Finkin, *Arbitral Participation*, *supra* note 204.

314. *Id.*

315. See generally Finkin, *Arbitral Participation*, *supra* note 204; *supra* note 204; They may also escape section 8(a)(2) if they are sufficiently powerless—if they are nothing more than a forum for “suggestions.” See *supra* note 88 and accompanying text. That,

Similarly, a state law that mandates the committees might be preempted (if it requires what the Act forbids), but it might not if it does not contemplate management interference or domination.³¹⁶ In short, these state-mandated committees might dodge the combined threat of section 8(a)(2) and federal preemption—in which case they might offer a new way for unions to represent employees outside the federal Act—or they might not—in which case they would present a particularly appealing occasion for reexamining the scope of either section 8(a)(2) or preemption or both.

These last two potential sites of reform—narrowing the scope of federal preemption and narrowing the scope of section 8(a)(2)'s ban—correspond to two large forces that in recent decades have gained momentum on many fronts within American law and policy, and that are conventionally associated with a conservative political ideology: greater state and local autonomy as against federal regulation, and greater scope for “market” forces as against any form of regulation. It should not be surprising that it is where the existing labor law regime appears most incongruent with contemporary legal trends that it appears most vulnerable to attack or amenable to reform. But concessions either to greater state and local authority or to the market may seem to have ominous implications for the future of labor law. What remains of the New Deal's commitment to reverse the “race to the bottom” among firms through regulation of the market, and, in effect, to avert a “race to the bottom” among states through federalization? And what should remain?

Some might contend that, given the growing premium on the skills, knowledge, and initiative of workers, the “race to the bottom” among firms is overstated, and that the downward pressure that cost competition puts on labor costs may be counterbalanced, at least in some sectors, by the upward pressure that productivity demands exert.³¹⁷ Or perhaps the race among firms, whatever its direction, has so far outrun the capacity for centralized command-and-control regulation that we have no choice but to devise regulatory approaches that devolve greater regulatory authority to lower and more agile units of governance, including the firm

unfortunately, may be the most likely reconciliation between these laws, the committees they require, and the Act.

316. Or if it requires something less than employers' “dealing with” employees, and therefore does not constitute a “labor organization” under section 2(5). See *supra* note 77 and accompanying text; Finkin, *Arbitral Participation*, *supra* note 204.

317. For some qualified views in this camp, see Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development*, in *The Handbook of Economic Sociology* 137 (Neil J. Smelser & Richard Swedberg eds., 1994); Mark Barenberg, *Law and Labor in the New Global Economy: Through the Lens of United States Federalism*, 33 Colum. J. Transnat'l L. 445, 448–49 (1995) [hereinafter Barenberg, *Law and Labor*]; Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 Comp. Lab. L. & Pol'y J. 347, 349 (1999); Archon Fung et al., *New Democracy Forum: Realizing Labor Standards*, Boston Rev., Feb./Mar. 2001, at 4.

itself.³¹⁸ These large questions are for another day. But they do suggest again the need for some kind of “third way” between pure market governance and traditional forms of regulation. Firm level bargaining among the constituents of the firm, including empowered workers, may be a large part of the answer, and a legal regime that makes that possible may be playing just the right kind of role in this increasingly fluid and fast-moving economy.

D. *Extralegal Strategies of Law Reform in the Wake of Ossification*

Until we do construct new forms of regulation and a new labor law for this new economy, we will continue to see firms outrunning the existing labor law in their race for competitiveness and profits. They are outrunning the law in their use of coercive anti-union tactics as well as in their experimentation with new forms of employee representation. They are, in short, engaging in extralegal, even illegal, self-help in the face of an ineffectual legal regime. But employers are not the only ones who have begun to explore new strategies of self-help. As the law appears increasingly feeble in the face of aggressive employer tactics, enterprising and energetic unions are resorting to their own new forms of self-help. The unwieldiness of the Board’s election process and the virtual uselessness of the strike for most employees have spurred the growth of new union strategies that largely (though not completely) sidestep the labor laws.

Sometimes self-help takes a comparatively non-confrontational form, as when unions negotiate “neutrality agreements” with employers that establish alternative ground rules for organizing campaigns.³¹⁹ These agreements seek to minimize the delays and coercive tactics that are virtually endemic under the statutory election scheme. They typically bypass the Board’s election processes, substituting either “card-check recognition” or elections administered by jointly-chosen outside arbiters; they minimize the use of the Board’s unfair labor practice machinery by minimizing the employer’s use of the tactics that lead to ULP charges and often by providing for arbitration of disputes; they may circumvent the NLRA’s inadequate provisions for access to the workplace and to workers by negotiating for greater access.³²⁰ Such agreements are generally lawful and enforceable so long as they leave employees free to choose repre-

318. Unless the “devolution” of regulatory authority to the firm is coupled with the development of effective transnational norms and institutions, it promises a return to the “race to the bottom.” See Stone, *supra* note 281, at 990–95. For a thoughtful elaboration of a regime that combines both more local and firm-based mechanisms of labor standards enforcement and transnational mechanisms for monitoring and sanctions, see generally Barenberg, *Law and Labor*, *supra* note 317.

319. Hartley, *supra* note 41, at 408.

320. For an empirical study of 118 such neutrality agreements, including a summary of common provisions, see generally Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 *Indus. & Lab. Rel. Rev.* 42 (2001).

sentation or not and do not involve active employer “assistance” and support of the union.³²¹ And such agreements appear to have produced a much higher rate of success for unions, not only in securing recognition but in gaining a first collective bargaining agreement on behalf of the newly represented employees.³²² Neutrality agreements are a testament to the supple genius of contract. They also constitute a novel form of private lawmaking that is a direct response to the ineffectuality of the public labor law regime.

The question is how unions get the leverage to negotiate such agreements, given most employers’ penchant for vigorous opposition to union organizing. In the case of public projects, they may get leverage through political power; recall that states and municipalities, when acting in their “proprietary” capacity, have wide latitude to impose conditions on contractors in the interest of labor peace.³²³ Unions may also have leverage within existing bargaining relationships, and may be able to negotiate neutrality agreements for those same employers’ new locations.³²⁴ Often, however, unions will have neither source of leverage, and will have to fall back on their ability to inflict economic pain on employers, either to secure a neutrality agreement or to organize without one.

Of course, that brings us to the broader question of how unions secure any of their objectives over employer resistance. The NLRA was only

321. As a general matter, the agreements are enforceable under section 301, 29 U.S.C. § 185 (2000). See *Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 564–65 (2d Cir. 1993); *Hotel Employees Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1469 (9th Cir. 1992). Such agreements can sometimes run into the Board’s jurisdiction if they are deemed to raise statutory representation issues and not simply contractual disputes. See *United Ass’n of Journeyman Local 342 v. Valley Eng’rs*, 975 F.2d 611, 614 (9th Cir. 1992); *Amalgamated Clothing & Textile Workers Union v. Facetglas, Inc.*, 845 F.2d 1250, 1253 (4th Cir. 1988). But such a conflict can be avoided by an agreement that sets out contractual standards for the resolution of representation issues, and provides a forum—often arbitration—for adjudication of contractual disputes. See George N. Davies, *Neutrality Agreements: Basic Principles of Enforcement and Available Remedies*, 16 Lab. Law. 215, 217–18 (2000).

322. See *Eaton & Kriesky*, *supra* note 320, at 51–52. The overall rate for union organizing success under neutrality agreements was 68%, as compared to 46% for NLRB elections. *Id.* at 51. For those unions that did achieve recognition under a neutrality agreement, virtually all achieved a first contract; by contrast, about 20% of unions gaining recognition under the NLRB’s processes never gained a collective bargaining agreement. *Id.* at 52–53.

323. See, e.g., *Hotel Employees*, 961 F.2d at 1469–70 (refusing to invalidate neutrality agreement without factual finding by lower court that employer had been “coerced” by illegal municipal action).

324. See *Hartley*, *supra* note 41, at 387–89. Some distinct legal issues may arise when unions seek neutrality clauses as part of the collective bargaining process at currently represented facilities. In particular, some of the provisions of neutrality clauses may be “non-mandatory” subjects of bargaining, as to which a party is prohibited from insisting to the point of a bargaining impasse. See Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, 16 Lab. Law. 201, 204–11 (2000). For the general prohibition on bargaining to impasse over non-mandatory topics of bargaining, see *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 344 (1958).

intended to curb certain objectionable forms of resistance, and left employees and unions largely to their own devices—the strike being the unions' primary device—to secure economic gains. As the law becomes increasingly ineffectual in combating employer illegality, and as the strike becomes increasingly suicidal for many employees in view of the lawful threat of permanent replacement, workers are turning to alternative forms of economic pressure to secure and enforce collective bargaining agreements as well as to gain recognition or the right to organize without employer opposition. These tactics target not only the "primary" employer, who may often be relatively insulated from public pressure, but others who have ties to and leverage over the primary employer.³²⁵ The "corporate campaign," for example, seeks concessions from employers by targeting directors, customers, suppliers, lenders, and investors with publicity and other forms of pressure.³²⁶ A broader term—the "comprehensive campaign"—may better describe campaigns that appeal directly to the public by way of rallies, pickets, speeches, and leafleting in public streets and parks, often with the active support of churches and other community organizations outside the labor movement itself.³²⁷ For example, the Service Employees' International Union's "Justice for Janitors" campaign has been widely touted for its effective use of non violent but disruptive protest tactics, as well as for its successful targeting of highly capitalized and publicly visible building owners to secure representation and economic gains for mostly immigrant janitors employed by scores of small and obscure (and easily dissolved) janitorial service contractors.³²⁸

325. This aspect of the new strategies is potentially in conflict with the secondary boycott provisions of the NLRA. See *supra* note 26 and accompanying text; *infra* note 332 and accompanying text.

326. See generally Indus. Union Dep't, AFL-CIO, *Developing New Tactics: Winning With Coordinated Corporate Campaigns* 4–10 (1985) (describing corporate campaigns as including coalitions with other groups; legislative initiatives; appeals to regulatory agencies; litigation; consumer actions; pressuring creditors and lenders; withdrawals of, or threats to withdraw, pension fund assets; shareholder actions; and in-plant actions).

327. See generally Ruth Needleman, *Building Relationships for the Long Haul: Unions and Community-Based Groups Working Together to Organize Low-Wage Workers*, in *Organizing to Win*, *supra* note 10, at 71 (describing particular importance of wider community involvement in organizing low wage women workers); Ronald Peters & Theresa Merrill, *Clergy and Religious Persons' Roles in Organizing at O'Hare Airport and St. Joseph Medical Center*, in *Organizing to Win*, *supra* note 10, at 164 (stating that religious group involvement gave moral legitimacy to union efforts and forced management to tone down its opposition); Katherine Sciacchitano, *Finding the Community in the Union and the Union in the Community: The First-Contract Campaign at Steeltech*, in *Organizing to Win*, *supra* note 10, at 150 (stating that religious group involvement gave moral legitimacy to union efforts and forced management to tone down its opposition). Of course these new, more confrontational tactics are good for more than the securing of neutrality agreements or gaining recognition.

328. The Los Angeles campaign was especially successful and dramatic. See Catherine L. Fisk et al., *Union Representation of Immigrant Janitors in Southern California: Economic and Legal Challenges*, in *Organizing Immigrants: The Challenge for Unions in Contemporary California* 199, 199 (Ruth Milkman ed., 2000); Roger

The Justice for Janitors campaign is celebrated not only for its tactics and targets but also for its strategic circumvention of the traditional NLRA representation process—a circumvention much more complete than that which is accomplished through a “neutrality agreement.” The NLRA contemplates a lengthy process that begins with organizing and culminates with a contract, but that has many steps in between: a formal campaign, an election, certification and recognition, an often extended period of bargaining, and typically the threat or use of “economic weapons” to bring negotiations to closure. The process multiplies the occasions for employer resistance and delay, and dissipates the momentum of the organizing campaign before the workers can secure any concrete rewards. Justice for Janitors instead organized workers around concrete contractual objectives rather than the abstract intermediate goal of representation. Once a majority of workers had demonstrated its support for the union and its bargaining objectives (through authorization cards or even participation in a strike), the union could credibly promise that economic pressure and publicity would continue until employers—and the building owners who effectively controlled them—agreed not just to recognize the union but to grant acceptable contract terms.

The contrast between the law’s model for organizing and the emerging union model was demonstrated more recently by the 145 mostly immigrant workers at Riva Jewelry, which supplies Tiffany & Co.³²⁹ Faced with low wages and a filthy, hot, airless, and toxic workplace, eighty-three percent of the workers signed cards indicating their desire to form a union and to be represented by the Union of Needletrades, Industrial and Textile Employees (UNITE). But once the union drive became public, the company began its anti-union campaign, laying off fifty workers, and harassing, threatening, and bribing others. Under these conditions, the union lost the ensuing representation election by a close margin in April 2001. Since then, the NLRB’s General Counsel has charged Riva with 135 violations of the Act.³³⁰ In the meantime, union leaders changed gears. With the help of local labor councils, UNITE leaders coordinated a nationwide protest on May 8, 2002, passing out leaflets and attracting press attention at twenty-five Tiffany stores in Beverly Hills, Dallas, New York, and other cities across the country. Within two weeks of this protest, Riva had recognized the union and negotiated a contract with higher wages, better health benefits, a joint health and safety committee, and the reinstatement of fired workers.³³¹

Waldinger et al., *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, in *Organizing to Win*, supra note 10, at 102.

329. The following account is taken from Community Campaign—Not Federal Labor Law—Helps Riva Jewelry Workers Win a Voice at Work, at http://www.aflcio.org/voiceatwork/month_riva.htm (last visited Aug. 28, 2002) (copy on file with the *Columbia Law Review*).

330. Id.

331. Id.

On the one hand, the Riva workers' success illustrates the promise of an extralegal strategy for the vindication of associational and bargaining rights. On the other hand, it is not a strategy that is easily replicated. The Riva workers were fortunate in being just one step removed from a high-profile, image-conscious retailer. Many workers lack that sort of leverage. Moreover, even with that leverage, it took the efforts of thousands of people across the country, and a massive outlay of time and resources, to vindicate the statutory rights of 145 workers in one factory to organize a union. It is not possible, and should not be necessary, to undertake that kind of mobilization on a routine basis.

The successes of the Riva workers and the Los Angeles janitors, among others, tell an interesting story about the role of labor law and the state of associational rights in the modern workplace. Most obviously, the NLRA did not protect the workers' rights of association and self-organization; it did not prevent or effectively remedy employer reprisals; and it did not provide a workable framework for securing union representation and a union contract. But neither was the law irrelevant. Labor's new tactics are hardly beyond the ken of the labor law regime. All of them can be sorted into the NLRA's mutually exclusive legal categories of "protected," "unprotected," and "illegal"; and the parties still jockey over the proper characterization of these activities because it sometimes still matters.

The NLRA scheme matters most obviously insofar as it outlaws some union tactics, and authorizes injunctions and the award of damages against them. In particular, the law's ban on secondary boycotts constrains the means by which unions can put pressure on legally "neutral" employers such as Tiffany & Co. in the case of the Riva workers and the building owners in the case of Justice for Janitors.³³² They cannot appeal to the neutral's employees to strike, and they cannot ordinarily use "picketing" to appeal to the neutral's customers to withhold their patronage.³³³ These sorts of constraints, together with the inefficacy of the

332. The term "neutral" includes employers with a substantial business relationship with the primary employer; it includes employers that are completely dependent on the primary employer for their business, see NLRB v. Retail Store Employees Union Local 1001, 447 U.S. 607, 610 (1980) (*Safeco*), and even employers that are part of the same corporate entity with the primary, provided that the entities have separate labor relations policies. See L.A. Newspaper Guild Local 69, 185 N.L.R.B. 303, 303–05 (1970), enforced per curiam, 443 F.2d 1173 (9th Cir. 1971), cert. denied, 404 U.S. 1018 (1972); Am. Fed'n of Television & Radio Artists (Hearst Corp., Baltimore News Am. Div.), 185 N.L.R.B. 593, 593 (1970), enforced, 462 F.2d 887 (D.C. Cir. 1972). Only if the other employer has a common labor relations policy with the primary, or performs "struck work" for the primary, is it legally subject to primary strikes and picketing.

333. "Non picketing publicity" aimed at customers or the general public is not illegal under the Act; it is shielded by the Act's "publicity proviso" and by the First Amendment, the shadow of which yielded a narrowing construction of the Act's prohibition in *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988). Even picketing of a neutral's customers is permissible—it is not a violation of section 8(b)(4)—if it simply asks them not to purchase the products of the primary

law's affirmative protections, have led some union leaders to conclude that they would be better off with no labor law at all than with the labor law that exists.³³⁴

Certainly the ossified labor law regime poses obstacles to unions' ability to marshall public support and pressure employers. But unions still seek not only to avoid the prohibitions of the Act but to fit their activities under section 7's umbrella of protection.³³⁵ Gaining protected status under section 7 still matters, though not because the parties expect the Board to protect "protected activity" against employer reprisals. It matters, first, because the Board can provide a potential and eventual backstop of economic protection for individual workers who are fired for their participation in "protected activity." That may sound like a recantation of all that has been said about the inefficacy of the NLRB. It is not. Board proceedings are chronically slow and subject to delays. If workers must depend on board proceedings for the protection of their rights, they are grossly underprotected. A successful "extralegal" campaign, like that on behalf of the Riva workers, will secure reinstatement much more quickly than unfair labor practice charges. Still, the pendency of federal charges and the prospect of eventual remedies may supply additional leverage in negotiations.

Protected status matters, too, because "protected" activity cannot ordinarily be enjoined or prosecuted, either criminally or civilly.³³⁶ Much of what is thus protected is also protected by the First Amendment; but the labor laws play at least a supporting role in shielding protest activity from public sanctions. Finally, "protected" status, and the fact of Board proceedings that label the employer "unfair" and an "outlaw," lends moral legitimacy to labor activity in a climate in which public support for

employer and if those products make up a discrete and small enough share of the neutral's business. *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58, 70–72 (1964) (*Tree Fruits*).

334. Professor Trumka writes:

I say abolish the Act. Abolish the affirmative protections of labor that it promises but does not deliver as well as the secondary boycott provisions that hamstring labor at every turn. Deregulate. Labor lawyers will then go to juries and not to that gulag of section 7 rights—the Reagan NLRB.

Richard L. Trumka, Why Labor Law Has Failed, 89 W. Va. L. Rev. 871, 881 (1987); see also Kirkland Says Many Unions Avoiding NLRB, 132 Lab. Rel. Rep. (BNA) 13 (1989) (reporting that AFL-CIO President Lane Kirkland would prefer no law because current labor law "forbids us to show solidarity and direct union support").

335. Conduct that is "unprotected" is freely punishable by the employer, e.g., through discharge, though it may not be illegal. Moreover, employees who strike over employer reprisals against "protected" activity may be "unfair labor practice strikers" and therefore not subject to permanent replacement. See supra note 50. For an exploration of how the distinction affects typical corporate campaign conduct, see Melinda J. Branscomb, Labor, Loyalty, and the Corporate Campaign, 73 B.U. L. Rev. 291, 320–39 (1993).

336. The core of federal labor law preemption bars states from criminal prosecution or civil liability arising from "protected activity." See supra text accompanying notes 195–199. Federal courts are further barred from enjoining protected activity (and more) by the Norris-LaGuardia Act of 1932, 29 U.S.C. § 104 (2000).

labor may otherwise be tepid, and puts additional public pressure on the employer. The labor laws thus play a supporting role, and sometimes only a symbolic role, in these new dramas. But they do play a role.

These observations lead toward an incongruous conclusion. On the one hand, it appears that the process of ossification is itself paving an avenue of legal change. By finally rendering the law nearly useless to workers seeking a collective voice at work, the ossification of the labor laws is impelling those workers to construct a new labor law from the ground up—outside the walls of the established order, as it were.³³⁷ Their building blocks include the First Amendment; indeed, a labor movement that acts like a civil rights movement may get the benefit of the civil rights movement's version of First Amendment rights rather than the diminished version that unions have enjoyed since the 1950s.³³⁸ The building blocks include other less ossified bodies of state and federal law—both laws regulating employment and laws that are completely unrelated to employment, such as environmental law and corporate law—by which pressure may be brought to bear on employers.³³⁹

As with any successor regime, the building blocks of this new labor law include some elements of the existing regime—especially section 7 rights.³⁴⁰ That brings us to a paradoxical conclusion: Ossification can be labor's friend. Ossification has helped to assure the survival of the New Deal's inscription of labor's basic rights of association and collective action in the federal statute books. Some of the surviving statutory language that emerged out of that era—labor's pinnacle of power and public support—is more supportive of collective action than anything one can imagine emerging in the current political climate, or perhaps at any

337. See generally Pope, Right to Organize, *supra* note 72 (exploring the possibilities of using Constitutional law as a tool in grassroots labor campaigns).

338. *Id.* at 949–61; see also James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 Tex. L. Rev. 1071, 1090–96 (1987) (exploring the advantages of a First Amendment strategy for protecting union activity).

339. Unions may file such actions, and cannot be liable under the antitrust laws for doing so, even if they have an “anticompetitive purpose,” as long as the actions are not a “sham” brought without regard to the prospect for legal success. See *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61 (1993) (setting forth the two part definition for a “sham” litigation). Though they face formidable barriers of federal preemption, employers may also sue unions in response to protected concerted activity. Under *BE & K Constr. Co. v. NLRB*, 122 S. Ct. 2390 (June 24, 2002), employers who do so commit no unfair labor practice—even if they do so for retaliatory reasons, and even if their claims prove to be without merit—so long as the claims are “reasonably based.” The Supreme Court’s decision in *BE & K*, which raised the bar for treating retaliatory employer litigation as an unfair labor practice, foreshadows a more free-wheeling use of litigation by employers in these labor disputes outside the labor law. To the extent that employers are better able than unions to afford the cost of litigation, that bodes ill for unions.

340. Labor may also rely on the Norris-LaGuardia Act of 1932, 29 U.S.C. § 104, which bars injunctions against most peaceful labor activity (except that which was later banned and made enjoined by Taft-Hartley and Landrum-Griffin).

time since the New Deal.³⁴¹ Organized labor has little choice but to use that language for all it is worth, even if it is worth only a fraction of what it once was and only a fraction of what organized labor needs to reclaim a major role in the modern workplace.

Of course, even if unions reclaim that major role, they will reach far less than half, and probably far less than one-quarter, of the private sector labor force. What does the ossification of labor law mean for labor relations in the rest of the economy? In those workplaces, unions, collective bargaining, and labor law itself—apart from the widely ignored provisions of section 8(a)(2)—are virtually irrelevant. Employers essentially have their way in structuring or denying opportunities for employee participation in response to market forces and the perceived need to motivate and placate workers.

What seems to be emerging in the face of an ossified labor law regime is a bifurcated regime of quasi-self-help: In many workplaces, especially at higher layers of the labor market, employers are resorting to employee participation schemes of dubious legality to boost productivity and to try to satisfy or at least dampen employee desires for a voice at work. In other workplaces—those in which unionization is a serious prospect—some unions and employers are jointly circumventing the conventional legal processes for resolving representation disputes, and negotiating faster and less acrimonious groundrules in the form of “neutrality agreements.” More often, employers are resorting to indubitably illegal tactics of coercion and intimidation to fend off or cast off unionization, while unions sometimes try to counter by mounting campaigns of public pressure and protest. In these highly contentious battles, labor law, through the Board, plays a rather marginal role, slapping wrists and nipping at heels after the fact.

It is hard to see this emerging regime of quasi-self-help as anything other than partial, provisional, and transitional. It may afford some kind of collective voice to employees for whom the law’s prescribed form of representation is unappealing, unavailable, or irrelevant, and it may force some recalcitrant employers—those who cannot readily flee their aroused workforce or evade public scrutiny—to recognize and deal with a union. The latter, in particular, is no small accomplishment, and it is one that the labor law on the books often fails to achieve. But this melding of grassroots militancy and moral suasion will not create an effective model of representation for millions of workers who want a more collaborative relationship with their employer, and it may not have much traction

³⁴¹. To be sure, the subsequent Taft-Hartley restrictions stripped labor of much of its arsenal of tactics; but Taft-Hartley carried forward restrictions that long predated the Wagner Act, and that were creeping back into state law, with the blessing of the Supreme Court, before Taft-Hartley. See *supra* notes 24–28 and accompanying text. Taft-Hartley at least carried those restrictions forward in terms that were necessarily constrained by their juxtaposition to most of the original Wagner Act language.

within those sectors that are most directly exposed to international competition.

On the other hand, if this cobbled-together regime of quasi-self-help actually does succeed in arousing the public passions on which it relies, and in disrupting business as usual, it is a fair bet that labor law reform will be back on the table.³⁴² Labor would then have some bargaining chips, and management might be in a mood to make a deal.

CONCLUSION

The lack of congressional renewal or reform of the basic New Deal premises of the NLRA gives it an increasingly antiquarian feel. The ideas of collective rights, collective empowerment, and collective self-governance have grown unfamiliar to courts and to citizens as the legal landscape becomes increasingly occupied by substantive minimum standards, individual employee rights, and judicial remedies.³⁴³ Indeed, those New Deal ideas seem to some observers to be so hopelessly out of touch with contemporary mores and institutions as to be effectively “unamendable.” Nothing less than a complete overhaul would suffice, in their view, to bring labor law into the modern world.³⁴⁴

That may be right. But even a complete overhaul would surely begin with the bedrock elements of existing labor law: the rights of employees to discuss common concerns, to express shared grievances, and to organize an independent collective voice in the workplace, free from employer reprisals. Those rights, and the ideals of collective empowerment and economic democracy on which they rest, are widely—even internationally—regarded as minimum conditions of economic freedom and justice, and they form the foundation of every labor relations system in the modern world. Those basic associational rights are an inescapable starting point for even the most radical reform of the labor laws.

In the meantime, the labor movement confronts a less hypothetical question of how to construct a functioning labor law in the modern world. Faced with its own disastrous decline, the law’s failings, and the legislature’s paralysis, labor, too, is returning to the bedrock elements of existing law as the foundation for a regime in which workers can deploy the power of solidarity and public support to achieve their aims and realize their rights. But first it must shore up those bedrock rights in the public consciousness. Organized labor is being forced to remake the case

342. Hyde, *Labor Legislation*, *supra* note 72, at 436–38.

343. Brudney, *Reflections*, *supra* note 37, at 1571–72, 1589–91.

344. So suggested some of my colleagues in response to an earlier version of this Article. Of course, proposals for a complete overhaul of the labor laws face even more daunting political hurdles than mere “labor law reform” faces: Anything that promises an effective and independent collective employee voice will be opposed by management; and anything that does not, or that is drastically different from the current approach, is unlikely to be supported, and may be opposed, by much of the labor movement, which is the only organized voice that most employees have in the political process.

for organizational rights to the public, and to reconnect labor rights to the imperatives of justice, democracy, liberty, and equality that inspired their original enactment. That may prove to be the crucial first step toward real labor law reform.